

# Chapter 2

## Structure and Role of Representative Bodies

2.1 This chapter reviews the structure and role of representative bodies, including the governance structures of these bodies; their effectiveness in carrying out their statutory functions; and recent reforms announced by the Commonwealth affecting the functioning of these bodies.

2.2 There has been a significant shift in the expectations placed on representative bodies since the commencement of the *Native Title Act 1993* (NTA). Historically, the genesis of many recognised representative bodies was as community-based organisations – often local land councils or existing legal services. The original functions of the bodies, namely advocacy and community representation, have evolved towards an emphasis on roles requiring a high level of professional and administrative competence and a clear focus on native title objectives.

### Background

2.3 Following the High Court's *Mabo* decision of 1992 that the common law recognised the native title of Indigenous peoples of Australia, the passage of the Native Title Act provided, *inter alia*, for establishing a new class of Indigenous organisation – 'representative Aboriginal and Torres Strait Islander bodies', to assist native title claimants to make applications for the determination of native title and for compensation; and assist in negotiations and proceedings concerning native title.<sup>1</sup>

2.4 Native Title Representative Bodies (NTRBs) are representative Aboriginal and Torres Strait Islander bodies which are recognised under section 203AD of the NTA. The NTA sets out the requirements and process for the recognition of representative bodies as NTRBs. The Act provides that certain types of bodies are 'eligible bodies' that may apply for recognition as representative bodies by the Minister. Under section 203AD the Minister may recognise a body as a representative body for an area if he or she is satisfied that it will satisfactorily represent persons who hold or may hold native title in an area, and be able to consult effectively with Indigenous people in that area. The Minister must also be satisfied that the body would be able to satisfactorily perform the functions of a representative body. Where there is no NTRB for an area, the Office of Indigenous Policy Coordination (OIPC) may provide funding to a body to enable it to perform some or all of the functions of an NTRB.

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1 Information in this section has been derived from *Submissions 1*, pp.2-4 (ATSIS); 1A, pp.9-14 (OIPC); and 16, pp.3-4 (Attorney General's Department).

2.5 The NTA was subject to extensive amendments in 1998, including provisions related to representative bodies. The amendments were designed to strengthen the representative body system by:

- setting mandatory functions, including a number of additional functions not contained in the original NTA;
- imposing nationally applicable standards of performance and accountability, based on models for other organisations funded by ATSIC;
- channelling assistance to claimants mainly through the representative body system, by way of ATSIC grants on application; and
- providing for only one representative body with responsibility for any particular area.

2.6 NTRBs are eligible for financial assistance from the Commonwealth. A variety of organisations have subsequently been recognised as representative bodies including:

- existing statutory land councils in the Northern Territory, NSW and South Australia;
- the Torres Strait Regional Authority (a statutory body replacing ATSIC in the Torres Strait);
- Aboriginal legal services in Victoria, Western Australia and South Australia; and
- a number of regional community-based organisations incorporated under the ACA Act which were originally established to advocate for land rights (for example, the Cape York and Kimberley Land Councils).

2.7 Currently, the following types of bodies operate as NTRBs or perform the functions of NTRBs:

- statutory bodies: these are NTRBs that are statutorily incorporated bodies with formal roles that are more extensive than the NTRB role and comprise the Northern Land Council, the Central Land Council and the Torres Strait Regional Authority (TSRA). The Northern Land Council and the Central Land Council are statutory authorities established under the *Aboriginal Land Rights (Northern Territory) Act 1976*. The TSRA is a statutory authority funded directly by the Commonwealth to enable it to perform its functions under the *Aboriginal and Torres Strait Islander Commission Act 1989*, including functions directly associated with the NTA. The TSRA was first appointed as an NTRB in 1995.
- non-statutory NTRBs: locally incorporated bodies whose principal role is as an NTRB but who may perform other functions – the majority of NTRBs.
- alternative service providers: bodies that are not formally recognised as NTRBs but are funded to perform the functions of an NTRB for a designated

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area comprising NSW Native Title Services, Native Title Services Victoria and Queensland South Native Title Services.

2.8 The following NTRBs operate around Australia:

Torres Strait (Qld)	Torres Strait Regional Authority
Cooktown (Qld)	Cape York Land Council
Cairns (Qld)	North Queensland Land Council Aboriginal Corporation
Queensland North	Central Queensland Land Council Aboriginal Corporation
Queensland Central	Gurang Land Council Aboriginal Corporation
Queensland South	Queensland South Native Title Services Ltd
Queensland West	Carpentaria Land Council Aboriginal Corporation
New South Wales	No representative body: currently NSW Native Title Services Ltd
Victoria	No representative body: currently Native Title Services Victoria Ltd
Tasmania	No representative body
South Australia	Aboriginal Legal Rights Movement
Goldfields (WA)	Goldfields Land & Sea Council Aboriginal Corporation
South West (WA)	South West Aboriginal Land & Sea Council Aboriginal Corporation
Central Desert (WA)	Ngaanyatjarra Council Aboriginal Corporation
Pilbara (WA)	Yamatji Marlpa Barna Baba Maaja Aboriginal Corporation*
Geraldton (WA)	Yamatji Marlpa Barna Baba Maaja Aboriginal Corporation*
Kimberley (WA)	Kimberley Land Council Aboriginal Corporation
Northern area (NT)	Northern Land Council
Southern area (NT)	Central Land Council

\*Yamatji Aboriginal Corporation represents two NTRB regions.

## Function and role

2.9 NTRBs are created under Part 11 of the NTA, and have six primary functions:

- facilitation and assistance (s.203BB);
- certification (s.203BE);
- dispute resolution (s.203BF);
- notification (s.203BG);
- agreement making (s.203BH); and
- internal review (s.203BI).

As such, NTRBs are primarily service delivery agencies who are responsible for providing native title services.

2.10 The six roles set out in the Act are detailed below.

### *Facilitation and assistance functions*

2.11 The facilitation and assistance functions of a representative body are to research and prepare native title applications, and to assist registered native title bodies corporate, native title holders and other holders of native title in consultations, mediations, negotiations and proceedings.

2.12 In performing its facilitation and assistance functions, a representative body must: consult with, and have regard to the interests of, native title holders or persons who are affected by the matter; and if the matter involves the representative body representing such bodies, be satisfied that they understand and consent to any general course of action that the representative body takes on their behalf in relation to the matter.

### *Certification functions*

2.13 The certification functions of a representative body are to certify in writing, applications for determinations of native titles; and applications for registration of indigenous land use agreements (ILUAs).

### *Dispute resolution functions*

2.14 The dispute resolution functions of a representative body are: to assist in promoting agreement between its constituents about the making of native title applications; to conduct proceedings about any matter relating to native title; and to mediate between its constituents.

### *Notification functions*

2.15 The notification functions of a representative body are to ensure that notices that are given to the representative body and that relate to land or waters within the

area for which the body is a representative body are brought to the attention of any person who the representative body is aware holds or may hold native title in relation to land or waters; and to advise persons of the relevant time limits imposed under the Act.

*Agreement making function*

2.16 Under the agreement making function, a representative body is a party to ILUAs. ILUAs are voluntary, legally binding agreements covering the use and management of land or waters, made between one or more native title groups and others, such as miners, pastoralists or governments. In performing its agreement making function a representative body must, having regard to the matters proposed to be covered by the agreement, consult with, and have regard to the interests of, persons who hold or may hold native title in relation to land or waters in that area.

*Internal review functions*

2.17 The internal review functions of a representative body are to provide a process for registered native title bodies corporate, native title holders and persons who may hold native title, to seek review by the representative body of its decisions and actions, made or taken in the performance of its functions or the exercise of its powers, that affect them.

2.18 In addition, a representative body must as far as is practicable and necessary:

- identify persons who may hold native title in the area;
- take appropriate action to promote understanding, among Indigenous people living in the area, about matters relevant to the operation of the NTA;
- consult with Indigenous communities that might be affected by the matters with which the body is dealing; and
- co-operate with other representative bodies for the purpose of promoting the effective and efficient exercise of the functions and powers of representative bodies.

2.19 NTRBs provide some or all of the following services on behalf of their clients:

- the preparation and lodgement of claims;
- the preparation and lodgement of compensation cases;
- the preparation and lodgement of test cases;
- responding to non-claimant applications;
- responding to future act negotiations;
- native title educations functions;
- heritage and site clearing tasks; and
- servicing of Prescribed Bodies Corporate.

2.20 Submissions from NTRBs noted that the primary function of representative bodies is the facilitation and assistance of native title determination applications.<sup>2</sup> For many Indigenous groups, their local NTRB is the principal source of advice and representation on native title matters. These groups may be native title holders or registered native title bodies corporate that represent native title holders.

2.21 An NTRB may represent people in mediation concerning claimant applications, and may be involved in future act negotiations (for example, in relation to the grant of mining interests) and the negotiation of ILUAs. Although NTRBs usually represent the applicant in native title determination proceedings, an NTRB may represent an Indigenous respondent party or an overlapping native title claim group or may be a party to native title proceedings in its own right.<sup>3</sup>

2.22 Submissions emphasised that the statutory functions of NTRBs are very broad, with NTRBs playing a crucial role in the processes established under the NTA. The services provided by NTRBs provide benefits not only to their Indigenous constituents but also a service to the public at large by establishing the means by which the various processes of the NTA are initiated.<sup>4</sup> The ATSI Social Justice Commissioner, highlighting the importance of NTRBs in the native title system, noted that NTRBs represent or assist between 70-90 per cent of the native title claims before the Federal Court.<sup>5</sup>

2.23 Evidence to the inquiry emphasised the importance of NTRBs to the overall workability of the native title system. The Minerals Council of Australia noted that NTRBs 'are *the* fundamental component of the Native Title system'.<sup>6</sup> The National Native Title Tribunal (NNTT) also noted that NTRBs are 'a fundamental component of the native title system and are vital in providing Indigenous people with a means to establish their substantive rights and to exercise their procedural rights under the Act'.<sup>7</sup>

### ***Additional functions***

2.24 A number of submissions argued that representative bodies should be given a broader role in promoting the economic and social development goals of native title holders, and in land management functions in particular.

2.25 The ATSI Social Justice Commissioner argued that there is a need to shift the focus of the native-title agreement-making process towards the economic and social development goals of the traditional owner group. The Commissioner noted that the

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2 Submissions 8, p.5 (NSWNTS); 38, p.6 (Carpentaria Land Council).

3 Submissions 8, pp.4-8 (NSW Native Title Services); 4, pp.5-8 (QIWG); 23, pp.3-4 (NNTT).

4 Submission 4, p.6 (QIWG); 8, p.5 (NSWNTS);

5 Submission 15, p.3 (ATSI Social Justice Commissioner).

6 Submission 20, p.1 (Minerals Council of Australia).

7 Submission 23, p.3 (NNTT).

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native title process is confined to addressing legal issues, either through litigation or through the negotiation of settlement agreements – 'consequently, much of the resources allocated to NTRBs is expended in this way. The capacity of NTRBs to negotiate more comprehensive agreements directed to the economic and social development goals of the group is severely limited'.<sup>8</sup>

2.26 In particular, the Social Justice Commissioner proposed that native title agreements should have a more deliberate focus on the group's goals for economic and social development; provide for the development of the group's capacity to set, implement and achieve their development goals; utilise the existing assets and capacities of the group; build relationships between stakeholders; and integrate activities at various levels to achieve the development goals of the group.<sup>9</sup>

2.27 Another submission argued that the NTA should be amended to confer land management functions on representative bodies.

...under the Native Title Act, representative bodies have virtually no role in relation to land-holding corporations, or prescribed bodies corporate nor in relation to land held as native title, once vested in the native title holders...Indeed, the Native Title Act is seriously deficient in the lack of attention it provides to land management functions generally.<sup>10</sup>

2.28 The Goldfields Land and Sea Council (GLSC) also supported an expanded role for NTRBs. The Council argued that representative bodies are the ideal agent for working, on behalf of Aboriginal people, with organisations such as the Indigenous Land Corporation and for negotiating with state governments on land acquisition and land management matters.<sup>11</sup>

2.29 The Committee believes that the current functions of representative bodies are extensive and place considerable demands on NTRBs. The Committee notes that the first priority under the NTA is the facilitation and assistance of native title determination applications which is essentially servicing the legal process. While a few representative bodies may have the capacity to undertake further functions, the Committee considers that many representative bodies may not have the expertise to undertake additional responsibilities such as land management or other functions. Additional functions would also add significantly to the workloads of NTRBs. As discussed in later chapters, many representative bodies are experiencing difficulties in fulfilling their core functions and this issue needs to be addressed before the conferring of other functions on NTRBs.

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8 *Submission 15*, p.14 (ATSI Social Justice Commissioner). See also ATSI Social Justice Commissioner, *Promoting Economic and Social Development through Native Title*, June 2004.

9 *Submission 15*, p.15 (ATSI Social Justice Commissioner).

10 *Submission 11*, p.2 (Mr J Basten QC).

11 *Submission 12*, p.6 (GLSC). See also *Submissions 38*, pp.12-13 (Carpentaria Land Council); 40, pp.12-13 (AIATSIS).

## Governance structures of representative bodies

2.30 Currently, the majority of representative bodies are incorporated under the *Aboriginal Councils and Associations Act 1976* (ACA Act). Whilst the details of the organisational structure of each representative body varies, the basis of the organisation is a governing committee, often termed a Board or Governing Council, elected by the membership – eligibility for membership usually entails being part of the Indigenous people of the area holding native title interests. This elected Board sets policy and establishes priorities. Each representative body also has an administrative arm, comprised of a CEO and professional and administrative staff. Professional staff includes lawyers, anthropologists and accountants.

2.31 The Corporations (Aboriginal and Torres Strait Islander) Bill 2005 is intended to replace the Aboriginal Councils and Associations Act and to improve corporate governance in the Indigenous corporate sector. The Bill is aligned in many respects with the *Corporations Act 2001* to apply modern corporate governance standards and corporations law to Indigenous corporations. However it is also intended to operate as a special statute of incorporation for Indigenous peoples to take account of the special risks and requirements of the sector.

2.32 As noted above, alternative service providers, based on an alternative incorporation regime under the Corporations Act, operate in NSW, Victoria and Queensland. In NSW, the original representative body, the NSW Aboriginal Land Council, advised the Minister that it did not wish to continue as an NTRB, while the Victorian representative body, the Mirimbiak Nations Aboriginal Corporation, had its representative body status withdrawn in April 2003. In June 2005, recognition of the Queensland South Representative Body Aboriginal Corporation was withdrawn by the Minister, and the Corporation was also the subject of investigations in relation to financial mismanagement.<sup>12</sup>

2.33 The alternative service providers are companies limited by guarantee incorporated under the Corporations Act. They are not-for-profit organisations and the constitutions of both companies prohibit them from paying, transferring or distributing any income or property to any member of the company except as bona fide compensation for services. As a matter of practice, the OIPC requires the companies to meet the same obligations as representative bodies and they are funded by the OIPC to perform most the functions of a representative body. However, since they are not representative bodies for the purposes of the NTA, they cannot certify or enter agreements as representative bodies, nor do they have the right to receive Future Act notices under the NTA. Under reforms recently announced by the Minister for Immigration and Multicultural and Indigenous Affairs, eligibility for recognition as an

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12 *Submission 1*, p.8 (ATSIS); ABC News Online, 'Indigenous corporation loses native title body status', 23 June 2005.

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NTRB will be extended to organisations incorporated under the Corporations Act.<sup>13</sup> This is discussed later in the chapter.

### **Effectiveness of representative bodies**

2.34 The Committee received a variety of views regarding the relative effectiveness of NTRBs in performing their statutory functions. A number of reasons, including governance arrangements, funding levels and the relative size of NTRBs were advanced to account for the efficacy of representative bodies in performing these duties.

2.35 Representative bodies pointed to key achievements within their areas of operations, especially in relation to determinations of native title claims.<sup>14</sup> The Carpentaria Land Council, reflecting the position of many NTRBs, commented that it 'is proud of its achievements to date and continues to strive to achieve real outcomes for its constituent traditional owner groups across its NTRB area'.<sup>15</sup>

2.36 Other evidence suggested, however, that NTRBs vary considerably in their overall effectiveness. The NNTT argued that it has observed 'apparent variations' in the capacity of NTRBs to perform their statutory functions in relation to matters involving the Tribunal, such as their involvement in the mediation of claimant applications and responses to proposed future acts.<sup>16</sup>

2.37 A representative of the WA government also commented on the effectiveness of NTRBs arguing that:

Do they all pursue their statutory tasks in an enthusiastic manner and in good faith? I believe they do. As governments across Australia would meet varying judgments as to how well they are doing their job, I guess the same would be said of rep bodies.<sup>17</sup>

2.38 While the OIPC conceded that some representative bodies are providing a professional level of service, 'other representative bodies fail to provide a consistently professional level of service delivery. In part, the problem stems from a changed operating environment where the current system of establishing and supporting representative bodies no longer suits all situations'. The OIPC stated that, overall, the

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13 Under recent Ministerial changes the responsible Minister is now the Minister for Families, Community Services and Indigenous Affairs.

14 See, for example, *Submissions* 29, pp.10-18 (Yamatji Aboriginal Corporation); 38, pp.8-10 (Carpentaria Land Council).

15 *Submission* 38, p.8 (Carpentaria Land Council).

16 *Submission* 23, p.6 (NNTT).

17 *Committee Hansard* 19 July 2005, p.27 (WA Government).

NTRB regime 'is not delivering a sufficiently professional, reliable and effective service to Indigenous native title claimants and holders'.<sup>18</sup>

2.39 The OIPC added that in terms of administrative efficiency, NTRBs represent 'a sort of continuum from the highly problematic and really bad to the ones that are really good'. The OIPC drew attention to the need to appoint funding controllers to several NTRBs as an indicator of inefficiencies in the system.

It depends where you put the benchmark in that ... One objective measure is the fact that at the moment we have three or four of them with funding controllers in. That does not mean that the funding controller is there because of corruption; it can be there for a number of reasons. It does not even mean it is there because they have misused their money, but that is one indicator. The fact that a number of them failed to get re-recognition in 1998 and over the course of a number of years some of them have been involuntarily derecognised is another indicator. But I would be loath to say that seven out of 17 are good and 10 out of 17 are not. It is a complex world.<sup>19</sup>

2.40 Some evidence argued that governance arrangements impede effective service delivery. The OIPC stated that the current statutory scheme for NTRBs in the NTA, limiting eligibility to ACA Act organisations, 'may not provide the best basis for providing client focussed service delivery' and that consideration needs to be given to making the scheme more flexible and open to different options for service delivery.<sup>20</sup> The OIPC noted that in ACA Act bodies the membership controls the corporation through the annual general meeting.

In this sense corporate control is not at the board or governing committee level but through the membership. This inevitably makes governance in NTRBs difficult and unstable since, under the ACA Act, control by the membership forms an uneasy partnership with quasi-statutory responsibilities and directors' duties to the corporation.<sup>21</sup>

2.41 The OIPC pointed to the advantages of alternative arrangements noting the 'professional service delivery' provided by the alternative service providers in several States.<sup>22</sup> The OIPC argued that these alternative providers have advantages over ACA Act representative bodies in terms of their ability to recruit expert directors and to minimise governance problems such as conflicts of interest and inadequate separation of powers.

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18 *Submission 1A*, p.2 (OIPC).

19 *Committee Hansard* 29 November 2005, p.22 (OIPC).

20 *Submission 1A*, p.34 (OIPC).

21 *Submission 1A*, pp.18-19 (OIPC).

22 *Submission 1A*, pp.15-16 (OIPC).

2.42 One example of this is the NSW Native Title Services (NSWNTS) which has a small maximum membership of up to 25 members and, importantly, is not directly based on native title holders within the jurisdictional area of the organisation. This provision puts both the members, as well as those directors elected by and from the members, at arms length from their clientele. There are up to seven member directors elected by the members and up to three non-member directors appointed by the member-directors. The member-directors may only appoint a person a non-member director if they are satisfied that the person has professional or technical skills that would assist the board of directors to manage the company. This provision provides the possibility of inviting non-members with particular skills, experience or standing to join the board in a way not normally available for representative bodies incorporated under the ACA Act.<sup>23</sup>

2.43 However, other representative bodies maintained that current governance arrangements do not impede effective delivery of service to clients. The Carpentaria Land Council noted that its governance arrangements provides for effective service delivery and, importantly, governance by representatives from the native title communities within its representative body area:

The CLCAC believes that this governance model provides for effective service delivery as it allows for decision making processes which reflect traditional law and custom within its area and thereby minimising the opportunity for conflict....It is also not the experience of the CLCAC that control by its membership, through its general meetings, makes governance difficult, or unstable, or that it forms an uneasy partnership with quasi-statutory responsibilities.<sup>24</sup>

2.44 The Goldfields Land and Sea Council also pointed to achievements in the area of governance. The Council was a finalist in Reconciliation Australia's 2005 inaugural national Indigenous Governance Awards – awards that highlight Indigenous achievements in governance – and the only NTRB selected in the final selection group.<sup>25</sup>

2.45 Other evidence suggested that statutory bodies rather than the non-statutory bodies have been more effective in fulfilling their role as NTRBs. The Indigenous Land Corporation (ILC) stated that NTRBs that are statutory bodies (namely the Northern Land Council, Central Land Council and the Torres Strait Regional Authority) with formal roles that are more extensive than the NTRB role 'have performed at the better end of the spectrum when it comes to performing NTRB functions'. The ILC noted that:

The statutory bodies are generally better resourced by virtue of performing non-NTRB functions and being appropriately resourced to do so. This

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23 *Submission 1A*, p.16 (OIPC).

24 *Submission 38*, p.12 (Carpentaria Land Council).

25 *Committee Hansard* 19 July 2005, p.62 (GLSC).

necessarily has some carry over effect into their ability to competently perform in the native title arena. Their statutory backing and formal statutory roles and responsibilities have also given the statutory bodies a great degree of stability.<sup>26</sup>

2.46 The ILC noted that non-statutory NTRBs (the majority of NTRBs fall into this category) have a varied track record in performing NTRB functions. The ILC considered that a number of these NTRBs 'have fallen into the trap of spreading themselves too thinly in the services they provide in trying to be more generic land councils'. The ILC submitted that while it is a legitimate aspiration for such community bodies, 'regrettably they have not been appropriately resourced to undertake such a wider brief which has meant that the more specific NTRB functions for which they are specifically funded have suffered.<sup>27</sup> The ILC further argued that:

These NTRBs, in attempting to fulfil a wider agenda, have often not shown an ability to perform their NTRB functions in an appropriately strategic and targeted manner. These NTRBs have often had a range of staff but some with limited or inappropriate skills or capacity, and the same observation could be made of governing committees. These deficiencies could be overcome ... by capacity building programs and by recruiting quality and appropriate staff.<sup>28</sup>

2.47 The ILC also noted, however, that there are other models, for example, the Aboriginal Legal Rights Movement in South Australia, which is a non-statutory NTRB representing the whole State, with which the Corporation has had 'a pretty good experience' in its dealings over some time.<sup>29</sup>

2.48 Other submissions argued that inadequate funding is a key factor limiting the ability of representative bodies to fulfil their statutory responsibilities. Rio Tinto commented that 'the NTRB structure is valid and workable' with the most significant constraint on the effective operation of the native title system being the inadequate resourcing of NTRBs.<sup>30</sup> Representative bodies also frequently commented during the inquiry that chronic underfunding limited their capacity to achieve more effective outcomes. The issue of funding of representative bodies is discussed further in chapter 3.

2.49 Finally, some evidence suggested that the relative size of representative bodies also affect their operational effectiveness. Some submissions argued that there may be a case for reducing the number of representative bodies, resulting in fewer but larger bodies. At present some States and the Northern Territory are serviced by one,

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26 *Submission 21*, p.2 (ILC). See also *Committee Hansard* 21 November 2005, pp.2-3 (ILC).

27 *Submission 21*, p.3 (ILC).

28 *Submission 21*, p.3 (ILC). See also *Committee Hansard* 21 November 2005, p.3 (ILC).

29 *Committee Hansard* 21 November 2005, p.5 (ILC).

30 *Submission 18*, pp.3,5 (Rio Tinto).

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or a relatively few, large NTRBs. Elsewhere, such as Queensland, there are a number of smaller, regionally based representative bodies. The OIPC argued that larger representative bodies potentially benefit from economies of scale, may be more able to attract and keep quality staff, and consequently provide a superior service to clients.<sup>31</sup> On the other hand larger bodies can become detached from, and unresponsive to, their constituency.

### ***Conclusion***

2.50 The Committee received a range of evidence on the effectiveness of representative bodies during the inquiry. While the Committee acknowledges that representative bodies perform their statutory functions under difficult circumstances and many do so commendably, evidence indicates that the performance of some representative bodies needs to improve.

2.51 Based on the evidence received during the inquiry, the relative effectiveness of representative bodies appears to be dependent on a number of factors. Some evidence suggests that the current governance arrangements which limit eligibility to act as representative bodies to ACA Act organisations may not provide the best basis for providing client-focussed service delivery in all circumstances. Alternative service providers appear to offer some advantages in terms of effective service delivery, especially in their ability to recruit experienced directors and to minimise governance problems such as conflicts of interest and inadequate separation of powers. In this regard, the Committee notes that the Corporations (Aboriginal and Torres Strait Islander) Bill 2005 is intended to replace the ACA Act and aims to improve corporate governance in the Indigenous corporate sector.

2.52 Evidence also suggests that NTRBs that are statutory bodies have been relatively more successful in fulfilling their NTRB roles. These bodies are generally better resourced than the non-statutory NTRBs by virtue of performing non-NTRB functions and have a degree of administrative expertise sometimes lacking in non-statutory NTRBs. Inadequate funding of NTRBs was also cited as a contributing factor in limiting the ability of NTRBs to perform their functions effectively and this issue is discussed further in chapter 3. The relative geographical size of representative bodies may also have an impact on how effective these bodies function, although other factors appear to play a more significant role in operational effectiveness than considerations of size.

2.53 The Committee notes that evidence to the inquiry on the relative performance of NTRBs was largely anecdotal with little detailed analysis available to provide a comprehensive picture of the overall efficacy of NTRBs. The Committee believes that more rigorous comparative data should be developed by the OIPC so that detailed information is available to assess the relative effectiveness of representative bodies and that this information should be publicly available. The Committee notes that the

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31 *Submission 1A*, p.19 (OIPC).

OPIC collects a comprehensive range of information as part of the accountability requirements imposed on representative bodies and that this data should be used to build up a comprehensive picture of the overall effectiveness of NTRBs in fulfilling their statutory requirements. The Committee also notes that a number of NTRBs failed to get re-recognition in 1998 and some have since been involuntarily derecognised. The reasons leading to these developments should also provide valuable information for the OIPC in any analysis of the factors responsible for the relative performance of representative bodies.

### **Recommendation 1**

**2.54 The Committee recommends that the OIPC develop comparative data, based on a range of key performance indicators, to assess the relative effectiveness of NTRBs in meeting their statutory obligations and that this data be published annually.**

### **Reforms to representative bodies**

2.55 On 23 November 2005, the Minister for Immigration and Multicultural and Indigenous Affairs announced a series of changes to the functioning of NTRBs, involving amendments to the Native Title Act. The changes include measures to:

- enhance the quality of service by broadening the range of organisations that can undertake activities on behalf of claimants;
- impose a time limit on the recognised status of NTRBs to ensure a focus on outcomes; and
- streamline the process for withdrawing recognition from poorly performing NTRBs and appointing a replacement.<sup>32</sup>

2.56 These issues are discussed below. Changes to funding arrangements were also announced and these are discussed in chapter 3.

#### ***Alternative service providers***

2.57 Under the proposed reforms eligibility for recognition as an NTRB will be extended to organisations incorporated under the Corporations Act – that is, ordinary companies, rather than the current requirement that the organisation be incorporated exclusively under the Aboriginal Councils and Associations Act. The OIPC stated that this measure will address the problem of service providers in NSW, Victoria and Queensland that at present cannot be recognised as representative bodies because they are not incorporated under the ACA Act. The OIPC also stated that the change will allow more bodies similar to the above to be recognised as NTRBs.<sup>33</sup>

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32 Minister for Immigration and Multicultural and Indigenous Affairs, 'Delivering Better Outcomes in Native Title – Update on Government's Plan for Practical Reform', *Media Release*, 23 November 2005.

33 *Committee Hansard* 29 November 2005, pp.3-4 (OIPC).

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2.58 Existing NTRBs can maintain their current incorporation arrangements, although they are not precluded from incorporating under the Corporations law if they wish. Future NTRBs can be incorporated either under the Corporations Act or under the Aboriginal and Torres Strait Islander Corporations law.<sup>34</sup>

2.59 The efficacy of current alternative service providers was raised during the inquiry. The OIPC stated that the emergence of these service providers provides the opportunity for a wider range of organisations to provide native title services.<sup>35</sup> The OIPC stated that:

Essentially, the option of allowing Corporations Act organisations to be eligible to be recognised as representative bodies would open up an alternative basis for NTRB incorporation, providing for increased flexibility in native title service arrangements.<sup>36</sup>

2.60 As noted previously, the OIPC argued that these alternative service providers have advantages over ACA Act representative bodies in terms of their ability to recruit expert directors and to minimise governance problems such as conflicts of interest and inadequate separation of powers.<sup>37</sup>

2.61 The OIPC stated that, while there are some limitations on alternative service providers performing the full range of representative body functions at present, in practice such limitations 'are not judged to be significant and have not been a major bar to professional service delivery by the alternative service providers'.<sup>38</sup>

2.62 The ILC also stated that, notwithstanding the limitations to their functions, the experience of alternative service providers in Victoria and NSW suggests that 'they can still perform a very considerable range of NTRB functions to useful effect'. The ILC added that:

These NTRBs have quickly developed a culture of targeted service delivery and have avoided the trap of trying to take on a wider brief. It is probably too early to comment on the success of these bodies as yet. But they provide an interesting contrast to non-statutory NTRBs that have spread themselves too thinly.<sup>39</sup>

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34 The Corporations (Aboriginal and Torres Strait Islander) Bill 2005 is intended to strengthen the legislative framework for corporations in the Indigenous corporate sector. It is therefore aligned in many respects with the Corporations Act to apply modern corporate governance standards and corporations law to Indigenous corporations.

35 *Submission 1A*, p.34 (OIPC).

36 *Submission 1A*, p.19 (OIPC).

37 *Submission 1A*, p.16 (OIPC).

38 *Submission 1A*, pp.15-16 (OIPC).

39 *Submission 21*, p.3 (ILC).

2.63 Notwithstanding the perceived advantages of alternative service providers, many representative bodies raised concerns with the service provider model, especially in relation to the need for such organisations to be accountable to their Indigenous constituency. Representative bodies argued that they are uniquely placed to deliver culturally and socially appropriate native title outcomes, and to develop and maintain effective, long lasting stakeholder relationships which are crucial to native title processes.<sup>40</sup>

2.64 The Carpentaria Land Council argued that if all NTRBs were forced to adopt 'non-representative models of governance' there is potential for real conflict between directors, members and the NTRB's clients. This is particularly so where the membership of the organisation can include persons that are not the traditional owners of the land and waters within the NTRB's area. The OIPC noted, however, that the alternative service providers are elected bodies, with the majority of directors also being elected.<sup>41</sup>

2.65 The Carpentaria Land Council argued that it has demonstrated a satisfactory 'division of responsibility' between its elected and administrative arms and that it was not the experience of the Council that control by its membership, through its general meetings, makes governance difficult, or unstable, nor that it forms an uneasy partnership with its quasi-statutory responsibilities. The Council contended that its structure 'provides a model of Indigenous participation in decision-making which also allows for the exercise of the right to effective participation and the right to self determination'.<sup>42</sup>

2.66 The OIPC acknowledged that in providing for a system of alternative service providers 'there are issues of accountability and Indigenous participation in decision-making to be taken into account...Close consultation with the Indigenous community will be necessary for such arrangements to be widely accepted and workable'.<sup>43</sup>

2.67 The NNTT makes the important observation that the efficient delivery of services, rather than particular governance arrangements, should be the key consideration in assessing the efficacy of NTRBs:

The Tribunal makes no submission with respect to the preferable structure or form of governance of bodies to deliver relevant services under the Native Title Act. Rather, we say that, whatever legal form is considered desirable for representative bodies, the important thing is that each body is able to deliver and does deliver the range of services to native title claimants.<sup>44</sup>

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40 See, for example, *Submission 38*, p.3 (Carpentaria Land Council).

41 *Committee Hansard* 29 November 2005, p.8 (OIPC).

42 *Submission 38*, p.12 (Carpentaria Land Council).

43 *Submission 1A*, p.19 (OIPC).

44 *Committee Hansard* 21 November 2005, p.58 (NNTT).

2.68 The GLSC also stated that 'whilst flexibility [in service provision] can be condoned, that does not mean to say that good models that have been established need to be trashed and set aside'.<sup>45</sup>

### *Conclusion*

2.69 The Committee believes that effective and client-focussed service provision is fundamental to the operation of NTRBs. The Committee notes that the proposed changes to the incorporation regime will address the limitations on current alternative service providers in performing the full range of representative body functions and welcomes these changes.

2.70 While the emergence of alternative providers may make the representative body system more flexible and open to different options for service delivery, the Committee considers that the Commonwealth needs to closely monitor and evaluate the effectiveness of services provided by these providers – both those currently operating and those that may emerge in the future.

2.71 The Committee believes that, while it is important to put in place appropriate governance arrangements for NTRBs, it is equally important that representative bodies, whatever their governance arrangements, effectively fulfil their statutory obligations and are accountable to their Indigenous constituency. The Committee notes that the proposed reforms still provide for a range of governance arrangements to operate.

### *Fixed terms of recognition*

2.72 The reforms also provide for NTRB recognition to be for a fixed term from one to six years. Currently, NTRBs, once recognised by the government, are recognised indefinitely.

2.73 In July 2007 all existing NTRBs will be automatically re-recognised for fixed terms of up to six years. To avoid system-wide disruption, the terms will vary between NTRBs to allow future recognition processes to be staggered. Recognition periods will be determined on the basis of need and performance. If, for example, most outstanding native title claims in a particular area are expected to be resolved in three years, a three year recognition period would be a sensible recognition period for that area's NTRB. If an NTRB is not performing to an appropriate standard, a shorter recognition period would apply. Any new NTRB would probably be given a short term initially to allow an assessment of performance. A high performing NTRB in an area with an extensive claims load could expect a maximum recognition period.<sup>46</sup>

2.74 At the conclusion of their recognition period, the Minister will have the option of re-recognising the NTRB for a further period, although not necessarily the same

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45 Committee Hansard 19 July 2005, p.62 (GLSC).

46 Committee Hansard 29 November 2005, p.5 (OIPC).

period as the original one. If the Minister decides not to offer an NTRB another term, applications for recognition for that area may be invited from another NTRB or from other organisations.

2.75 The Committee questioned the procedural fairness of leaving the decision of whether to extend the recognition period solely to the discretion of the Minister. The OIPC explained the process in the following terms:

That decision of the minister's would, of course, be subject to the normal constraints and the advice that she would get would be subject to the usual constraints on the system. But it would ultimately be the minister's decision about whether recognition would be extended for a further six years or more than that period. We would expect that the NTRB would have the opportunity to make its submission both to ourselves as the adviser to the minister and ultimately to the minister herself.<sup>47</sup>

2.76 The Committee believes that input in the form of an independent advisory panel should be established to advise the Minister on decisions to re-recognise representative bodies. The establishment of an advisory panel would provide transparency to the process of re-recognition.

## **Recommendation 2**

**2.77 The Committee recommends that the Commonwealth establish an independent advisory panel to advise the Minister on the re-recognition of NTRBs once their recognition period has expired.**

2.78 The Committee also raised the issue of the implications for a region in situations where an NTRB is not re-recognised and the necessity to avoid a period of hiatus.

2.79 The OIPC noted that it was expected that the Minister 'either give the organisation notice at the end of the period it was not going to be recognised or give it short-term recognition for six or nine months or whatever until a new rep body could be positioned'.<sup>48</sup>

2.80 The Committee considers that the later option is particularly unsatisfactory and believes that transitional arrangements need to be more carefully developed by the OIPC.

## **Recommendation 3**

**2.81 The Committee recommends that the Commonwealth provide further details of the proposed transitional arrangements that will apply when the recognition period for NTRBs expires in order to avoid uncertainty for claimants.**

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47 *Committee Hansard* 29 November 2005, p.5 (OIPC).

48 *Committee Hansard* 29 November 2005, p.6 (OIPC).

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2.82 The Committee also raised the issue of claims that are overlapping the boundaries of two different representative bodies. The OIPC conceded that this problem is not addressed by the current reforms.

It is not proposed to change the principle at the moment whereby the boundaries are specified. Those overlapping boundary problems or overlapping claimant problems as between the border of one rep body and another will not be solved by these legislative changes.<sup>49</sup>

#### **Recommendation 4**

**2.83 The Committee recommends that the Commonwealth address the issue of native title claims that overlap the boundaries of different representative bodies to avoid uncertainty for claimants.**

#### *Withdrawal of recognition of NTRBs*

2.84 The reforms also provide for a simplified process to allow the Minister to withdraw recognition of an NTRB that is not performing its statutory functions, or has serious financial irregularities.

2.85 The OIPC argued that the current de-recognition process is difficult to administer 'largely because of the requirement that not only does the rep body have to be failing to perform its functions but it has to have no capacity...to reform itself. That is a very difficult criterion to satisfy because it deals with what might happen in the future'. The OIPC explained that it is intended to change the provisions for withdrawal of the recognition:

....so as to remove that requirement, so that the minister is able to deal with the past history and present situation of the body without having to make a judgement about its future capacity, and also to introduce the notion of significant financial irregularity as a criterion for derecognition.<sup>50</sup>

2.86 The current 90 day mandatory timeframe for the Minister to give notice to an NTRB that withdrawal of recognition is being considered will be reduced to 60 days. The OIPC noted that the 90 day notice period was 'considered unnecessarily lengthy, particularly if you are dealing with a malfunctioning organisation in which there are third parties affected'.<sup>51</sup>

2.87 The Committee considers that the proposed changes to the withdrawal of recognition of representative bodies are justified given the need for the Commonwealth to respond within an adequate timeframe to organisations that are failing to fulfil their statutory functions.

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49 *Committee Hansard* 29 November 2005, p.6 (OIPC). See also *Committee Hansard* 12 May 2004, pp.20-21 (ATSIS).

50 *Committee Hansard* 29 November 2005, p.4 (OIPC).

51 *Committee Hansard* 29 November 2005, p.4 (OIPC).

### ***Reduction in numbers of NTRBs***

2.88 Another reform canvassed during the inquiry (although not part of the reform package announced by the Minister), was the possible reduction in the numbers of representative bodies.

2.89 The OIPC stated that there may be a case for reducing the number of representative bodies, resulting in fewer but larger bodies. The OIPC argued that larger representative bodies potentially benefit from economies of scale, may be more able to attract and keep quality staff, and consequently provide a superior service to clients.<sup>52</sup>

2.90 The NNTT argued however that the effectiveness of NTRBs depends on a variety of factors in addition to the size of the representative body, including the history of the particular body.

On the one hand, you might say bodies representing smaller regions may be more responsive to the needs of local communities than state-wide bodies. On the other hand, the Aboriginal Legal Rights Movement, for example, in South Australia has striven valiantly, and I think with a good deal of success, to incorporate traditional decision-making processes at various levels in its work.<sup>53</sup>

2.91 The Carpentaria Land Council also argued that larger representative bodies may not be able to meet the logistical challenges of NTRBs in servicing remote areas. This may lead to a deterioration of service delivery and failure to acknowledge, and respond to, the specific cultural and social realities of remote communities.<sup>54</sup>

2.92 The Committee believes that the effectiveness of representative bodies depends on a range of factors, with the size of the NTRB being only one consideration, and does not consider that there should be a reduction in the number of representative bodies on the grounds of size alone.

### ***Conclusion***

2.93 The Committee generally welcomes the recent reforms announced by the (then) Minister for Immigration and Multicultural and Indigenous Affairs to improve the functioning of NTRBs, and considers that they address several of the concerns raised during the inquiry related the operation of NTRBs.

2.94 As noted above, the Committee believes that the proposed changes to the incorporation regime will address the limitations on current alternative service

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52 *Submission 1A*, p.19 (OIPC).

53 *Committee Hansard* 21 November 2005, p.64 (NNTT).

54 *Submission 38*, p.13 (Carpentaria Land Council).

providers in performing the full range of representative body functions and provide for a broadening in the range of organisations that can be recognised as NTRBs.

2.95 The Committee notes that while alternative providers may make the representative body system more flexible, a range of different options for service delivery needs to be available. As discussed previously, many representative bodies incorporated under the ACA Act operate effectively and provide client-focussed service delivery.

2.96 The Committee welcomes the proposed changes that seek to impose a time limit on the recognised status of NTRBs. The Committee believes that this will ensure a focus on outcomes. The Committee considers, however, that there should be input in the form of an advisory panel to provide independent advice to the Minister on decisions to extend the recognition period of representative bodies. The Commonwealth should also provide further details on the proposed transitional arrangements when the recognition period for NTRBs expires.

2.97 The Committee also welcomes the proposal to streamline the process for withdrawing recognition from poorly performing NTRBs. It considers that the Commonwealth needs to have the mechanisms in place to be able to respond quickly in situations where representative bodies are failing to fulfil their statutory functions.

2.98 The Committee believes that the Commonwealth should consider taking further measures to address the issue of native title claims that overlap the boundaries of different representative bodies in order to avoid uncertainty for claimants. The Committee notes that this issue is not addressed in the proposed reforms.

