

## CHAPTER 3

### NATIVE TITLE REPRESENTATIVE BODIES AND PRESCRIBED BODIES CORPORATE

3.1 This chapter discusses key issues raised in submissions and evidence in relation to the following aspects of the Bill:

- Native Title Representative Bodies (Schedule 1); and
- Prescribed Bodies Corporate (Schedule 3).

#### **Schedule 1 – Native Title Representative Bodies**

3.2 Schedule 1 of the Bill introduces a new regime for Native Title Representative Bodies (NTRBs). While some organisations supported Schedule 1 of the Bill,<sup>1</sup> many others raised areas of concern. This section considers the following issues:

- funding and resourcing of NTRBs;
- recognition arrangements;
- variation in the geographical areas administered by NTRBs;
- accountability requirements; and
- other issues.

#### ***Funding and resourcing of NTRBs***

3.3 The funding and resourcing of NTRBs was an overarching issue raised consistently in evidence to the committee.<sup>2</sup> For example, the National Native Title Council (NNTC) suggested that:

Most representative bodies have to date operated effectively and efficiently within the constraints of the resources that have been provided to them...what is needed to make them even more effective is adequate funding...rather than seek ways to facilitate legal practices or other such organisations taking over the current functions of representative bodies, the Government should simply adequately fund the current NTRBs.<sup>3</sup>

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1 See, for example, Australian Petroleum Production and Exploration Association, *Submission 2*; Western Australian Local Government Association, *Submission 7*; Mr Ian Loftus, Association of Mining and Exploration Companies, *Committee Hansard*, 30 January 2007, p. 32.

2 See, for example, National Native Title Council, *Submission 9*, p. 2; Minerals Council of Australia, *Submission 4*, p. [2]; Mr Ian Loftus, Association of Mining and Exploration Companies, *Committee Hansard*, 30 January 2007, pp 32-33; Aboriginal and Torres Strait Islander Social Justice Commissioner, *Submission 10*, p. 8.

3 *Submission 9*, p. 2.

3.4 The Minerals Council of Australia (MCA) expressed broad support for the amendments. However, the MCA qualified its support by cautioning that the amendments 'are likely to be destabilising without appropriate funding and capacity building initiatives...'.<sup>4</sup> Ms Anne-Sophie Deleflie, Assistant Director of Social Policy at the MCA, told the committee that:

...there is a critical need to ensure that the legislative amendments are matched by increasing resources, both in terms of human and financial capital, and capacity-building initiatives...Without those additional resources we are concerned that these reforms will be seriously undermined.<sup>5</sup>

3.5 In particular, the MCA argued that the measures in the Bill:

...have the potential to divert already limited resources towards bureaucratic processes, unnecessarily onerous compliance obligations or the winding-up and establishment of new services, and away from the primary functions of representing Indigenous interests and achieving native title outcomes. Without addressing the underlying capacity issues and resource constraints, such organisational changes may only provide a short-term impression of change.<sup>6</sup>

3.6 Similarly, the Aboriginal and Torres Strait Islander Social Justice Commissioner strongly supported any change that is likely to improve the effectiveness of representative bodies.<sup>7</sup> However, the Commissioner made the point that:

...representative bodies are not presently adequately funded to perform their extremely difficult and important role in the recognition and protection of native title.<sup>8</sup>

3.7 The Commissioner further submitted that:

Without adequate funding, however, even the most well run representative bodies will find it extremely difficult to achieve results and it is inevitable that the enjoyment of native title rights and interests will be compromised. I believe that inadequate funding has, and continues to, undermine the capacity of representative bodies to provide effective representative [representation] and assistance and as a result has diminished the extent to which Indigenous people have been able to secure recognition of and enjoy their rights.<sup>9</sup>

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4 *Submission 4*, p. [3].

5 *Committee Hansard*, 30 January 2007, p. 36.

6 *Submission 4*, p. [2].

7 *Submission 10*, p. 8.

8 *Submission 10*, p. 8.

9 *Submission 10*, p. 8.

3.8 The Commissioner suggested that Schedule 1 should be considered in light of the likelihood that representative bodies will continue to be under resourced. The Commissioner supported the proposed amendments to the extent that they 'enhance, encourage or support representative bodies to make the most of their limited resources.' However, the Commissioner suggested that the amendments should be reconsidered to the extent that they:

- reduce the ability of representative bodies [to] plan effectively, or
- entail additional administrative burdens that are not likely to lead to a direct improvement in effectiveness....<sup>10</sup>

3.9 The committee notes that the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Account (PJC) considered the issue of funding and resourcing in detail in its *Report on the Operation of Native Title Representative Bodies* (PJC Report).<sup>11</sup> The PJC made several recommendations to address these matters, including that:

...the Commonwealth immediately review the level of operational funding provided to NTRBs to ensure that they are adequately resourced and reasonably able to meet their performance standards and fulfil their statutory functions. (Recommendation 8)<sup>12</sup>

3.10 The submission from the Attorney-General's Department and the Department of Families, Community Services and Indigenous Affairs (FaCSIA) noted that the amendments in the Bill 'are being complemented by non-legislative measures aimed at building the capacity of NTRBs to deliver services.'<sup>13</sup> In particular, they submitted that FaCSIA is funding significant capacity building activity:

NTRBs frequently call for more funding to address these deficiencies. However, the key to improving performance is to increase capacity to provide professional services, rather than putting additional funds into organisations that are struggling through lack of appropriate skills and experience. The capacity building program includes specialist training in governance, administrative law and contract management. There is also a project designed to improve the capacity of NTRBs to attract and retain quality staff.<sup>14</sup>

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10 *Submission 10*, p. 9.

11 Under section 207 of the Native Title Act the PJC ceased operations on 23 March 2006.

12 Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Account, *Report on the operation of Native Title Representative Bodies*, March 2006 (PJC Report), p. 44. See also recommendations 5-7.

13 *Submission 1*, p. 8.

14 *Submission 1*, p. 10.

3.11 A representative of FaCSIA also told the committee that the Government has allocated '\$15.6 million over four years specifically for the purpose of performance enhancement and capacity building in the rep body system.'<sup>15</sup>

*Committee view*

3.12 The committee acknowledges concerns about the level of funding and resourcing of NTRBs. In particular, the committee endorses the comments and recommendations made in relation to this issue by the PJC in its report on NTRBs. The committee welcomes the Government's evidence to the committee that the proposed amendments will be complemented by funding for capacity building activities directed at NTRBs. Nevertheless, the committee has concerns that some aspects of the proposed amendments, particularly the provisions for limited term recognition, have the potential to increase the administrative burden on NTRBs. The committee considers that its recommendations for amendments to these provisions, detailed below, will help to alleviate any potential increased burden on NTRBs.

***Recognition arrangements***

*Limited term recognition*

3.13 As outlined in Chapter 2 of this report, the Bill would replace the current system of indefinite recognition of NTRBs with a scheme where NTRBs will be recognised for fixed terms of between one and six years.<sup>16</sup>

3.14 This proposal was another key concern for many organisations. For example, the NNTC strongly opposed the periodic recognition of NTRBs.<sup>17</sup> The NNTC felt that this would cause a number of problems for NTRBs, including:

- potential conflict of interest: NTRBs may feel the need to compromise their activities to produce 'outcomes' for government in order to obtain re-recognition;
- inability to plan for the long term future; and
- diversion from core business to focus on re-recognition processes.<sup>18</sup>

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15 *Committee Hansard*, 30 January 2007, p. 58; see also Government Response to the Report by the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Account on the Operation of Native Title Representative Bodies, p. 3, tabled 15 February 2007

16 See especially item 7 of Schedule 1, which would insert proposed subsection 203A(3A) into the Native Title Act. Note also that the Bill makes provisions for transitional arrangements: see Explanatory Memorandum, pp 5-6, and the discussion in Chapter 2.

17 *Submission 9*, pp 3-4.

18 *Submission 9*, p. 4.

3.15 The NNTC suggested that there are already sufficient controls to ensure that NTRBs operate effectively, including the deregistration processes currently in the Native Title Act, review provisions and grant conditions.<sup>19</sup>

3.16 Mr Philip Vincent, Counsel for the NNTC, suggested that the periodic recognition provisions would effectively punish all representative bodies 'by making their tenure so indeterminate that they cannot operate in any confident way.'<sup>20</sup> Mr Vincent also pointed out that the lack of certainty caused by the proposed periodic recognition would make it more difficult for third parties to deal with NTRBs.<sup>21</sup>

3.17 Ms Anne-Sophie Deleflie of the MCA gave an example of the potential for problems arising from limited term recognition for NTRBs:

Negotiations involving big projects for mining companies can take two years. You develop relationships, you understand how a particular rep body works and you might have reached certain agreements on points that are not yet formalised in an agreement. If you suddenly derecognise a rep body and change some boundaries and appoint a new body, there can be some very big disruptions to those negotiations involved in that process...<sup>22</sup>

3.18 The MCA recommended that the fixed terms should be for a minimum of three to six years, rather than the proposed terms of one to six years.<sup>23</sup>

3.19 Mr Andrew Chalk, of Chalk and Fitzgerald Lawyers and Consultants, was similarly concerned about the proposal for periodic recognition of NTRBs, pointing out that NTRBs might need to divert resources to the process of re-recognition:

It is ironic that the explanatory memorandum speaks of cutting red tape by abandoning the strategic plans but imposes a very high burden on rep bodies in terms of constantly having to go back and reapply to be able to do their job.<sup>24</sup>

3.20 Mr Chalk also expressed the view that this proposal would cause uncertainty for NTRBs over their status. Mr Chalk pointed out that:

The proposal is for recognition as short as one year. In one year you will be doing nothing other than preparing your application for the next round...<sup>25</sup>

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19 *Submission 9*, p. 5.

20 *Committee Hansard*, 30 January 2007, p. 10.

21 *Committee Hansard*, 30 January 2007, p. 10; see also Ms Anne-Sophie Deleflie, MCA, *Committee Hansard*, 30 January 2007, p. 36.

22 *Committee Hansard*, 30 January 2007, p. 37.

23 *Submission 4*, p. [2]; see also Ms Anne-Sophie Deleflie, MCA, *Committee Hansard*, 30 January 2007, p. 36.

24 *Committee Hansard*, 30 January 2007, pp 3 and 5.

25 *Committee Hansard*, 30 January 2007, p. 3.

3.21 Mr Chalk again drew the committee's attention to the fact that the Native Title Act already provides mechanisms for the withdrawal of recognition of a body that is not performing.<sup>26</sup> Mr Chalk argued that:

...you must have a mechanism to take away recognition where bodies are not performing but that does not mean to say that you jump to the other extreme and require every body to go through quite an intensive process on a regular periodic basis.<sup>27</sup>

3.22 Mr Anthony McAvoy, representing Queensland South Native Title Services, described the proposal for periodic recognition as 'harsh'.<sup>28</sup> Mr McAvoy was also concerned that if recognition were to be withdrawn from an NTRB, the process of transition to a new NTRB would be problematic and time consuming. He told the committee that applicants or traditional owners would be 'left in positions where they are unable to be represented or where the level of representation that is able to be provided is not as you would hope to deliver.'<sup>29</sup> Mr McAvoy suggested a minimum recognition term of at least two years.<sup>30</sup>

3.23 The Aboriginal and Torres Strait Islander Social Justice Commissioner opposed the enactment of provisions relating to limited period recognition. However, the Commissioner made a number of suggestions for amendments if the provisions were to be enacted, including that:

- the minimum period of recognition should be increased from one to three years;
- a formal legal link between recognition and funding should be established, such that the Department will be required to provide funds to recognised representative bodies for the whole recognition period;
- the Minister should be required, no later than a specified time before the expiry of the period of recognition of a representative body, to invite that representative body to apply for a further period of recognition;
- there be some criteria in the Native Title Act (or regulations) for making decisions about the length of the recognition period that NTRBs will be offered.<sup>31</sup>

3.24 Several other organisations made similar suggestions in relation to the proposal for periodic recognition.<sup>32</sup> For example, the Carpentaria Land Council

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26 *Committee Hansard*, 30 January 2007, p. 5.

27 *Committee Hansard*, 30 January 2007, p. 9.

28 *Committee Hansard*, 30 January 2007, p. 27.

29 *Committee Hansard*, 30 January 2007, p. 26.

30 *Committee Hansard*, 30 January 2007, p. 28.

31 *Submission 10*, pp 11-13.

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Aboriginal Corporation (Carpentaria Land Council) was concerned that no criteria were specified for the Minister in making a decision as to the length of time for which a body is to be recognised. The Carpentaria Land Council also argued that 'one year's recognition will never be a sufficient period for the purposes of setting meaningful goals and allocating resources.'<sup>33</sup>

3.25 The submission from the Attorney-General's Department and FaCSIA assured the committee that, under the proposed system for periodic recognition:

Those with a history of achieving strong outcomes and maintaining sound administration and governance could expect a maximum or near-maximum term, and to be re-recognised at the end of their terms.<sup>34</sup>

3.26 A representative of FaCSIA reiterated this during the committee's hearing:

We would not expect that, if an NTRB were satisfactorily performing its functions—and that means representing the interests of the claimants and the native title holders in its region—it would have anything to be worried about. We are not seeking to undermine the native title rep body system.<sup>35</sup>

3.27 The representative also reassured the committee that, in making recognition decisions, the Minister would be mindful of ensuring that there is ongoing stability and continuity in the system.<sup>36</sup>

3.28 The representative from FaCSIA further informed the committee that, in future, funding will be tied to the recognition period:

Currently NTRBs are only funded on a year-to-year basis. In future core funding will be delivered in three-year blocks corresponding to the recognition terms.<sup>37</sup>

3.29 Nevertheless, the representative from FaCSIA told the committee that a one-year term might be appropriate in some situations.<sup>38</sup> The representative explained the current system, where NTRBs are recognised indefinitely, caused difficulties:

...in being able to have a regular review of performance, to give feedback and, if necessary, blow the whistle without going into the potentially litigious realms of a derecognition process...<sup>39</sup>

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32 See, for example, Carpentaria Land Council, *Submission 13*, pp 2-4; Chalk and Fitzgerald Lawyers and Consultants, *Recommendations in relation to the Native Title Amendment Bill 2006*, Tabled Document, 30 January 2007, p. 1.

33 *Submission 13*, p. 3.

34 *Submission 1*, p. 52.

35 *Committee Hansard*, 30 January 2007, p. 62.

36 *Committee Hansard*, 30 January 2007, p. 63.

37 *Committee Hansard*, 30 January 2007, p. 52; see also p. 62.

38 *Committee Hansard*, 30 January 2007, p. 58.

3.30 The committee notes that the PJC welcomed these proposed reforms:

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.<sup>40</sup>

*Committee view*

3.31 The committee acknowledges concerns raised in relation to the proposed recognition of NTRBs for fixed terms. In particular, the committee acknowledges evidence that this may cause considerable uncertainty for both NTRBs and third parties dealing with those NTRBs. The committee further notes concerns that the re-recognition process could result in an additional burden on the already stretched resources of NTRBs. At the same time, the committee recognises the need to regularly review the performance of NTRBs in a streamlined and efficient manner.

3.32 The committee welcomes the evidence from FaCSIA that, in future, NTRB funding will be tied to the recognition period. However, the committee considers that evidence that the proposed minimum recognition period of one year is too short is persuasive. The committee considers that the minimum recognition period should be increased from one year to two years, noting that, in certain circumstances, it will be possible for the Minister to withdraw recognition from an NTRB earlier where necessary. Further, the committee notes that the process for the Minister to withdraw recognition from an NTRB will be simplified and streamlined under the amendments proposed by the Bill.

*Criteria for recognition of NTRBs and variation of NTRB areas*

3.33 Submissions also raised issues in relation to the proposed changes to the criteria for recognition of NTRBs, and the criteria for the Minister's decision to vary, reduce or extend a body's representative area.

3.34 As outlined in Chapter 2, the Bill proposes to remove two criteria that the Minister is presently required to consider before recognising or withdrawing recognition from representative bodies.<sup>41</sup> These are:

- whether the body does or will satisfactorily represent native title holders and persons who may hold native title in its area; and
- whether the body does or will consult effectively with Aboriginal peoples and Torres Strait Islanders living in its area.

3.35 The Bill proposes similar changes to the criteria for the Minister's decision to vary, reduce or extend a body's representative area.<sup>42</sup>

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39 *Committee Hansard*, 30 January 2007, p. 63.

40 PJC Report, p. 27.

41 Items 13 and 24 of Schedule 1.



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3.36 However, when making these decisions the Minister will still need to be satisfied that a body satisfactorily performs or would be able to satisfactorily perform representative body functions.<sup>43</sup>

3.37 Several submissions expressed concern about these proposed changes. The NNTC submitted in relation to these amendments that:

...the proposed removal of the Minister's needing to be satisfied about these matters for actual recognition as a representative body constitutes a clear downgrading of the importance of these matters. Also, it remains unclear as to how 'representation' will continue to be interpreted.<sup>44</sup>

3.38 The NNTC concluded that:

The ability of the Minister to determine which eligible body will be successful will, if the Bill is passed, be entirely discretionary. These changes, over time, are likely to significantly change the nature of NTRBs from 'representative' bodies to bodies that merely 'represent' native title claimants (such as legal practices).<sup>45</sup>

3.39 Similarly, Mr Anthony McAvoy, representing Queensland South Native Title Services, was concerned that this amendment was:

...directed towards allowing service bodies to take over the role that representative bodies now fulfil. It allows the providers of native title services to be less connected to the people that they represent, in my view. ...Without being required to have that representativeness, I believe that it would potentially be far more difficult for a service body to represent the interests of the traditional owners across the region effectively.<sup>46</sup>

3.40 The Aboriginal and Torres Strait Islander Social Justice Commissioner also raised a related concern about the review rights of NTRBs. The Commissioner pointed out that under the Bill, decisions relating to the recognition and withdrawal of recognition will be 'legislative instruments', and thus will no longer be reviewable under the *Administrative Decisions (Judicial Review) Act 1977*. The Commissioner was concerned that, by subjecting such decisions to parliamentary disallowance, the proposed amendment would:

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42 Items 18-20 of Schedule 1.

43 Explanatory Memorandum, p. [6]; see also proposed subsection 203AI(1) and items 24 and 27 of Schedule 1; Attorney-General's Department and FaCSIA, *Submission 1*, p. 9; FaCSIA, *Submission 1A*, p. 1.

44 *Submission 9*, p. 5.

45 *Submission 9*, p. 6; see also the Aboriginal and Torres Strait Islander Social Justice Commissioner, *Submission 10*, pp 14-15.

46 *Committee Hansard*, 30 January 2007, p. 27.

...politicise recognition decisions, making them vulnerable to inappropriate public comment and potential political disruption in what should be a principled and predictable administrative process.<sup>47</sup>

3.41 The Western Australian Government's Office of Native Title was concerned that these amendments 'appear to be aimed at reducing the representative role of NTRBs.' It commented that 'the need for and objective of these proposed amendments is not clear', and suggested the Commonwealth should provide further information about the rationale for these amendments.<sup>48</sup>

3.42 In their submission, the Attorney-General's Department and FaCSIA did provide some rationale for the amended criteria:

The criteria for recognition, withdrawal of recognition and changes to boundaries are currently cumbersome and time-consuming, and require proofs which are difficult to measure with any certainty, making decisions easily susceptible to legal challenges and consequent delays in service delivery.<sup>49</sup>

3.43 In response to concerns that the amendments move towards a system of 'representing rather than representation', a representative of FaCSIA told the committee that:

With respect, that confuses the system of the [Native Title Act], which has always been about representation in terms of delivering outcomes for applicants and native title holders. That remains unchanged and, in fact, a number of provisions in the Act which refer specifically to representation remain in the act. They include section 203AB(2) which provides that NTRBs must maintain organisational structures and initial processes that promote satisfactory representation and consultation; 203BB provides that NTRBs have to represent claimants or facilitate their representation, and, similarly, 203BC provides that an NTRB must consult with relevant bodies or persons...All that is changing is that the function in relation to representation has been moved as a stand-alone criterion.<sup>50</sup>

#### *Committee view*

3.44 The committee notes concerns raised in relation to the proposed changes to the criteria for recognition of NTRBs and variation of NTRB area. However, the committee considers that the changed criteria are appropriate. In particular, the committee notes that the Minister will still need to be satisfied that a body

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47 *Submission 10*, p. 18; see also Parliamentary Library, "Native Title Amendment Bill 2006", *Bills Digest No. 77 2006-07*, 6 February 2007, p. 5.

48 *Submission 3*, p. 2.

49 *Submission 1*, p. 9.

50 *Committee Hansard*, 30 January 2007, pp 53-53.

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satisfactorily performs, or would be able to satisfactorily perform, representative body functions.

### *Withdrawal of recognition of NTRBs*

3.45 As outlined in Chapter 2, the Bill also proposes to amend section 203AH of the Native Title Act to simplify the grounds for withdrawal of recognition.<sup>51</sup> The Attorney-General's Department and FaCSIA explained that under these amendments:

...the Minister will need to be satisfied that the NTRB is not satisfactorily performing its functions, or that there are serious or repeated irregularities in its financial affairs. The time period for the NTRB to respond to a withdrawal notice will be reduced from 90 to 60 days. These two changes will help avoid the gaps in service provision experienced previously.<sup>52</sup>

3.46 However, the NNTC described these changes as 'draconian and unnecessary':

The removal of the provision for the Minister to be satisfied, prior to de-recognition, that relevant deficiencies are unlikely to be remedied introduces a summary or 'sudden death' aspect to de-recognition.<sup>53</sup>

3.47 The NNTC was also concerned with the reduction of the response period for a notice of intention to withdraw recognition from 90 days to 60 days. The NNTC considered this reduction to be 'unrealistic'. The NNTC argued that this proposal would impose more pressure on organisations that are 'under-funded and over-worked'.<sup>54</sup>

3.48 The Attorney-General's Department and FaCSIA told the committee that, to date, one NTRB had been formally de-recognised and the de-recognition process took 18 months:

On the last occasion that recognition was withdrawn from a clearly dysfunctional NTRB, the process took eighteen months, during which time there was little service to claimants.<sup>55</sup>

3.49 A representative from FaCSIA further told the committee that this process had drawn their attention to the difficulties in the interpretation of the current section 203AH, under which:

...the Minister has to be satisfied that there is no prospect—no prospect at all—that there is any chance that the NTRB can change. It puts, with respect, an almost impossible burden on the Minister as the decision

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51 See especially items 24 and 25 of Schedule 1.

52 *Submission 1*, p. 9.

53 *Submission 9*, p. 6.

54 *Submission 9*, p. 6.

55 *Submission 1*, p. 9; see also FaCSIA, *Committee Hansard*, 30 January 2007, p 58.

maker...So that is why the government decided to simplify the grounds under which recognition can be withdrawn in future...<sup>56</sup>

### *Committee view*

3.50 The committee notes that the PJC considered these proposed reforms, including the changed criteria and reduced timeframes for response. The PJC welcomed the changes, concluding that they:

...are justified given the need for the Commonwealth to respond within an adequate timeframe to organisations that are failing to fulfil their statutory functions.<sup>57</sup>

3.51 The committee agrees with the PJC that the proposed changes in the Bill to the process for withdrawal of recognition of NTRBs are justified.

### *Recognition of non-Indigenous corporations*

3.52 As outlined in Chapter 2, item 5 of Schedule 1 proposes to amend section 201B of the Native Title Act to broaden the definition of 'eligible body' (that is, a body that can be recognised as a representative body) to include bodies incorporated under the *Corporations Act 2001*.

3.53 The Aboriginal and Torres Strait Islander Social Justice Commissioner felt that non-Indigenous corporations should not be eligible bodies. The Commissioner suggested that no justification for this amendment had been advanced, and that the amendment 'is inconsistent with the notion that representative bodies represent the exclusively Indigenous interests of native title claimants'. At the same time, the Commissioner argued that this amendment was unnecessary, 'since non-Indigenous corporations may already perform the functions of representative bodies under s203FE of the Act'.<sup>58</sup>

3.54 The NNTC was also opposed to these amendments. The NNTC was particularly concerned that, unlike Aboriginal Corporations, such companies would not be required to have any special constitutional requirements to be eligible – and in particular, specific objects relating to the performance of representative body functions. Further, the NNTC believed that such companies should be required to show they satisfactorily represent native title claimants and consult with Indigenous people in their area.<sup>59</sup>

3.55 The submission from the Attorney-General's Department and FaCSIA pointed out that under these amendments:

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56 *Committee Hansard*, 30 January 2007, p. 62.

57 PJC Report, p. 25; see also p. 27.

58 *Submission 11*, pp 20-21.

59 *Submission 9*, pp 5-6.

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While the sole criterion...will be the capacity to satisfactorily perform NTRB functions, the Act also has provisions about how those functions are to be performed, and these include provisions about representation and consultation that could tend to favour local indigenous organisations.<sup>60</sup>

### *Committee view*

3.56 The committee notes that the PJC Report also considered the issue of recognising organisations incorporated under the *Corporations Act 2001*. The PJC cautiously welcomed this proposal, noting 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.<sup>61</sup>

3.57 The committee endorses the comments made by the PJC in relation to the broadening of the bodies that can be recognised as an 'eligible body'.

### ***Variation in the geographical areas administered by NTRBs***

3.58 Many submissions were also concerned about the proposed changes in relation to the variation of NTRB areas. The proposed changes to the criteria for Ministerial decision-making have already been considered earlier in this chapter. However, other issues were also raised in relation to these proposals.

3.59 Dr James Weiner supported aspects of these amendments, believing they could lead to:

... positive outcomes on a number of claims in Queensland for example that currently straddle the jurisdictions of two NTRBs...[L]arge, regionally coherent potential native title claim groups may be disadvantaged due to the inability or difficulty encountered by neighbouring NTRBs to agree on an effective policy of joint management of such claims. In the same vein, any legislation that will make more effective the ability of an NTRB to operate in an adjacent area, as described in s.203BD, will also be to the benefit of these groups straddling two NTRB jurisdictions.<sup>62</sup>

3.60 However, the Aboriginal and Torres Strait Islander Social Justice Commissioner opposed these amendments, suggesting that the criteria of effective consultation and satisfactory representation should be retained, or at the very least, the proposal should be amended to remove the public right to comment on extensions and variations.<sup>63</sup>

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60 *Submission 1*, p. 9.

61 PJC Report, p. 23.

62 *Submission 11*, p. 2.

63 *Submission 11*, p. 18.

3.61 The Western Australian Government's Office of Native Title was also concerned with these amendments, recommending that:

...the Commonwealth commit to providing appropriate funding to any NTRBs affected by the provisions to ensure they are able to effectively perform their functions in respect of any new areas.<sup>64</sup>

3.62 The NNTC was concerned that an NTRB could be required to administer a larger area at the Minister's discretion. The NNTC observed that:

The current boundaries of NTRBs have been the result of considerable consultation and negotiation between government, NTRBs and their constituents. Boundaries are not mere matters of administrative convenience, but also represent cultural groupings and are reflected in NTRB membership and other constitutional aspects.<sup>65</sup>

3.63 The NNTC submitted that there could be difficulties in some circumstances:

For example, where an effective NTRB is required to expand into an area which does not have a current representative body, or where an NTRB is required to take over an area which was previously within another NTRB area, against the wishes of one or more traditional owner groups, it is likely to cause conflict and administrative dislocation.<sup>66</sup>

3.64 The NNTC suggested that an eligible body could be *invited* to take up the area, which it felt would 'ensure that only bodies that felt comfortable to represent the people of the area would end up doing so'.<sup>67</sup>

3.65 The NNTC again raised concerns about proposed changes to the time to respond to notices of Ministerial decisions to alter NTRB areas. It submitted that the reduction in the required response time from 90 days to 60 days was 'unrealistic':

Considerable consultation would be required by an NTRB with its constituents and other representative bodies in order to properly respond to such a notice.<sup>68</sup>

3.66 In relation to this issue, the committee notes that the PJC recommended that:

...the Commonwealth address the issue of native title claims that overlap the boundaries of different representative bodies to avoid uncertainty for claimants. (Recommendation 4)<sup>69</sup>

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64 *Submission 3*, pp 2-3.

65 *Submission 9*, p. 7.

66 *Submission 9*, p. 7.

67 *Submission 9*, p. 7.

68 *Submission 9*, p. 7.

69 PJC Report, p. 25.

3.67 The submission from the Attorney-General's Department and FaCSIA justified these proposals as follows:

From time to time it may be necessary or desirable to alter the boundaries of an NTRB, for example where a group of claimants feel more affinity with a neighbouring NTRB. Currently adjoining NTRBs could apply for their boundaries to be varied in this circumstance, but the Minister could not initiate the variation even if he receives strong representations from claimants. The amendments will allow him to do so, but there will be a requirement for consultation with the affected NTRBs and the public before any variation is finalised. Similarly, NTRBs will be able to apply to the Minister to extend their boundaries into an adjoining unrepresented area, something that can currently only be initiated by the Minister.<sup>70</sup>

*Committee view*

3.68 The committee notes concerns about the amendments in relation to the variation of representative body areas. However, the committee considers that these amendments are justified in order to provide a more flexible regime for varying the boundaries of NTRBs in appropriate circumstances.

***Accountability requirements***

3.69 As noted in Chapter 2, Schedule 1 proposes to remove the requirements for NTRBs to prepare strategic plans and annual reports, although NTRBs will still be required to keep accounting records.<sup>71</sup>

3.70 The Aboriginal and Torres Strait Islander Social Justice Commissioner was concerned about the abolition of approved statutory plans. The Commissioner believed that statutory plans provide 'a sound basis on which to base decisions about resource allocation', and are an important criterion for making recognition decisions. The Commissioner did acknowledge, however, that the repeal of the strategic planning provisions would not prevent representative bodies from undertaking such planning.<sup>72</sup>

3.71 The Carpentaria Land Council was also opposed to this amendment, arguing that 'medium to long term strategic planning is essential for an NTRB to be effective'.<sup>73</sup> The Carpentaria Land Council also felt that an approved strategic plan provided an 'appropriate and reliable benchmark' for the Minister in considering whether an NTRB is satisfactorily performing its statutory functions (which is in turn relevant to the Minister's decision to recognise a body as an NTRB).<sup>74</sup>

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70 *Submission 1*, p. 9.

71 See especially items 29-33.

72 *Submission 10*, p. 15.

73 *Submission 13*, p. 4.

74 *Submission 13*, p. 5.

3.72 Mr Andrew Chalk, of Chalk and Fitzgerald Lawyers and Consultants, emphasised the importance of strategic plans as public documents, noting that such public plans provide an objective standard against which to assess NTRBs.<sup>75</sup> Mr Chalk concluded that a public strategic plan is:

...not simply red tape; it has a fundamental role in ensuring the good governance and a strategic governance of the organisation and its limited resources.<sup>76</sup>

3.73 The committee notes that the PJC considered accountability requirements in its report and recommended that:

...the OIPC [Office of Indigenous Policy Coordination], in consultation with representative bodies, review the current compliance and accountability requirements placed on NTRBs with a view to reducing unnecessary duplication of reporting and streamlining reporting procedures. (Recommendation 16)<sup>77</sup>

3.74 However, the PJC cautioned that the accountability requirements should be streamlined 'without compromising the essential accountability requirements of representative bodies.'<sup>78</sup>

3.75 The Attorney-General's Department and FaCSIA submitted that:

In the dynamic native title environment where NTRBs have to respond to changing priorities, these [strategic] plans have tended to be couched in such general terms that they are neither informative nor useful. It has therefore been decided to remove this requirement from NTRBs. This does not mean they will not need to plan carefully – under funding conditions, they are required to prepare detailed annual operational plans, including estimates of costs and timeframes beyond the immediate 12 months – but it does rationalise the process.<sup>79</sup>

3.76 A representative of FaCSIA further told the committee that:

...the government strongly supports planning on the part of the NTRBs and the system. That is not the issue; the issue is: does a mechanism for approval of strategic plans by the minister facilitate that process? We have found that it does not. It is essentially a paper warfare exercise.<sup>80</sup>

3.77 In relation to annual reporting requirements, the Departments submitted that:

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75 *Committee Hansard*, 30 January 2007, pp 2-3; see also p. 4.

76 *Committee Hansard*, 30 January 2007, p. 3.

77 PJC Report, p. 62.

78 PJC Report, p. 62.

79 *Submission 1*, pp 9-10.

80 *Committee Hansard*, 30 January 2007, p. 53.



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The current requirement that NTRBs provide the Minister with annual reports for tabling in Parliament will also be removed. This puts an obligation on NTRBs that is not imposed on other Commonwealth-funded non-statutory organisations. The actual reporting requirements will not be diminished, and their reports will still be publicly available, but they will be saved the expense and workload of printing tabling copies.<sup>81</sup>

### *Committee view*

3.78 The committee notes concerns in relation to the proposed changes to the accountability requirements relating to NTRBs. However, the committee acknowledges that NTRBs will still need to meet strict accountability requirements, such as providing operational plans and keeping accounting records. The committee is satisfied that the changes to reporting requirements proposed by the Bill will reduce the administrative burden on NTRBs without compromising their accountability. The committee also notes that NTRBs can still produce strategic plans on an administrative basis, rather than as a statutory requirement.

### *Other issues*

#### *Native Title Service Providers*

3.79 As outlined in Chapter 2, the Bill proposes to allow Native Title Service Providers, who are funded under section 203FE of the Native Title Act to perform NTRB functions and to operate as representative bodies to the extent that this is appropriate (for example, where a representative body has refused to provide assistance).<sup>82</sup>

3.80 Dr James Weiner considered that these amendments:

...could seriously undermine the functions of existing NTRBs, as it will encourage disgruntled applicants to seek assistance elsewhere to lodge break-away claims in the knowledge that funding will be provided. It will, in other words, place further fissiparous pressures on claim groups already struggling to maintain collective unity in the face of a variety of native title related demands.<sup>83</sup>

3.81 The Attorney-General's Department and FaCSIA explained the need for this amendment in their submission as follows:

There are currently native title service providers undertaking native title functions in areas where there is no NTRB, either because the NTRB formerly representing the area had its recognition withdrawn, or sought to be released from recognition. There is an expectation that these organisations can do everything that an NTRB does. However, the NTA

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81 *Submission 1*, p. 10.

82 Explanatory Memorandum, p. 7.

83 *Submission 11*, p. 2.

[Native Title Act] currently does not (or may not) allow them to perform the full range of NTRB functions. Nor does it impose (or clearly impose) the same obligations on third parties as apply to their dealings with NTRBs. In practice, this has not constrained their activities to the extent that outcomes are affected, but it would be useful to clarify that all the same powers and obligations under the Native Title Act apply in relation to them.<sup>84</sup>

3.82 The NNTC expressed concern in relation to the related proposed subsection 203FE(1A).<sup>85</sup> This subsection would provide that the Secretary may only make funding available under subsection 203FE(1) where, in the Secretary's opinion, the function to be funded would not otherwise be performed in an efficient and timely manner. The NNTC argued that:

It is unfair and discriminatory that Aboriginal claimants in an area where there is an NTSP [Native Title Service Provider] rather than an NTRB do not have a right under the NTA [Native Title Act] to like funding for native title activities.<sup>86</sup>

3.83 However, the committee notes that the Explanatory Memorandum explains that the purpose of proposed subsection 203FE(1A) is to:

...clarify that persons or bodies should only be funded under subsection 203FE(1) where it is not feasible to recognise a representative body for an area to perform relevant services.<sup>87</sup>

#### *Relationship with other legislation*

3.84 The Aboriginal Legal Rights Movement (ALRM) raised another issue not dealt with by the Bill. This issue related to incoherence between the Native Title Act, the *Commonwealth Authorities and Companies Act 1997* (CAC Act), the *Corporate Law Economic Reform Package Act 1999* and the *Associations Incorporation Act 1985* (SA). In particular, the ALRM was concerned with sections 203EA and 203EB of the Native Title Act which refer to the CAC Act, which has been amended by the Corporate Law Economic Reform Package Act. The ALRM submitted that references to the CAC Act in the Native Title Act have caused considerable uncertainty to NTRBs as to the applicable law. Further, according to the ALRM, the Australian Government Solicitor has stated that 'it would be desirable to amend sections 203EA and 203EB at an appropriate time to reflect the scheme of the new CAC Act provisions'.<sup>88</sup>

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84 *Submission 1*, p. 10.

85 Item 43 of Schedule 1.

86 *Submission 9*, p. 7.

87 p. 18.

88 *Submission 6*, p. 7; see also Mr Christopher Charles, *Committee Hansard*, 30 January 2007, pp 23-25.

3.85 Mr Christopher Charles, General Counsel for the ALRM, stressed to the committee that sections 203EA and 203EB of the Native Title Act should be amended to clarify the situation:

...it is an important issue because we cannot have a situation, in my submission, where the Commonwealth knows, through the advice of its Government Solicitor, that this law is uncertain and difficult to operate. That is an unsatisfactory situation for the Commonwealth and for the rep bodies. In my submission it is absolutely vital that this committee makes a recommendation of some sort to deal with 203EA and 203EB, whether by way of repeal or by way of amendment to apply one law or the other. But something has to be done; it simply cannot be left.<sup>89</sup>

3.86 In response to the committee's questions on this issue, the Attorney-General's Department drew the committee's attention to the fact that this issue was noted in the second discussion paper on technical amendments to the Native Title Act.<sup>90</sup> The Attorney-General's Department told the committee that:

We anticipate proposals for technical amendments will be included in a Bill to be introduced in the Autumn 2007 sitting of Parliament.<sup>91</sup>

3.87 The committee notes the issues raised by the ALRM, and welcomes the evidence to the committee that the Government proposes to introduce amendments to clarify the operation of sections 203EA and 203EB.

### **Prescribed Bodies Corporate (Schedule 3)**

3.88 Schedule 3 of the Bill concerns the functioning of Prescribed Bodies Corporate (PBCs). In particular, Schedule 3 implements recommendations 5 and 7 from the report on *Structures and Processes of Prescribed Bodies Corporate* (the PBC Report).<sup>92</sup>

3.89 A number of submissions were concerned that significant aspects of the proposed PBC reforms would be left to the PBC Regulations.<sup>93</sup> The Western Australian Government's Office of Native Title called for the proposed amendments to the PBC Regulations to be released for public consultation so that they could be considered in conjunction with the Bill.<sup>94</sup>

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89 *Committee Hansard*, 30 January 2007, p. 25.

90 See Attorney-General's Department and FaCSIA, *Submission 1*, Attachment I.

91 *Submission 16*, p. 1; see also FaCSIA, *Committee Hansard*, 30 January 2007, pp 59 and 61.

92 See *Submission 1*, Attachment F.

93 For example, Office of Native Title: Western Australia Government, *Submission 3*, p. 4; Aboriginal and Torres Strait Islander Social Justice Commissioner, *Submission 10*, pp 38-45.

94 *Submission 3*, p. 4.

3.90 Similarly, the Aboriginal and Torres Strait Islander Social Justice Commissioner was concerned that Schedule 3 should not be considered in isolation from other proposed amendments to the Native Title Act and PBC Regulations.<sup>95</sup> For example, the Commissioner submitted that, although Item 2 of Schedule 3<sup>96</sup> could be characterised as a 'technical amendment':

When considered together with the proposed regulatory changes, it becomes clear that the proposed amendment anticipates substantial changes to PBC functions that limit native title holders' rights in relation to future acts.<sup>97</sup>

3.91 The Commissioner therefore recommended that Item 2 of Schedule 3 should be deferred until all proposed changes to the Native Title Act relevant to PBCs, and proposed amendments to the PBC Regulations, can be considered together.<sup>98</sup>

3.92 The submission from the Attorney-General's Department and FaCSIA in relation to Item 2 of Schedule 3 explained that the PBC Report found that:

...existing requirements for PBCs to consult with and obtain the consent of common law native title holders before making decisions to surrender native title, or before doing or agreeing to do any other act affecting native title, imposed a very significant burden on PBCs. It accordingly recommended that compulsory consultation should only apply to decisions to surrender native title. Item 2 of Schedule 3 will amend the Native Title Act to allow the PBC Regulations to make provision to this effect.<sup>99</sup>

3.93 Their submission further pointed out that:

It will remain open to members to require their PBC to consult with the common law native title holders about additional decisions under the PBC's rules if this is considered desirable.<sup>100</sup>

3.94 Other submissions did not have concerns with the provisions of Schedule 3, but took the opportunity to raise the issue of lack of funding and resourcing for PBCs.<sup>101</sup> For example, Ms Anne-Sophie Deleflie of the MCA told the committee that:

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95 *Submission 10*, p. 38.

96 As outlined in chapter 2, Item 2 of Schedule 3 removes the requirement in paragraph 58(e) of the Act for PBCs to consult with common law holders on all agreements and decisions affecting native title.

97 *Submission 10*, p. 39.

98 *Submission 10*, p. 45.

99 *Submission 1*, p. 12; see also Explanatory Memorandum, p. 73; and PBC Report, Recommendation 5.

100 *Submission 1*, p. 12; see also Explanatory Memorandum, p. 73.

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...the lack of appropriate funding for PBCs, again, financially, in terms of capacity, is emerging for the minerals industry as a critical business issue.<sup>102</sup>

3.95 Ms Deleflie continued:

...the MCA supports amendments to the Native Title Act that relax the statutory requirements on PBCs, as this may reduce the resource needs of PBCs, but cautions that support should be provided to native title holders who decide their PBCs should still consult with native title holders on decisions that materially affect the exercise of their native title rights and interests, and urges the government to reconsider the resources available to PBCs to ensure that they are functioning and effective organisations.<sup>103</sup>

3.96 Similarly, the Aboriginal and Torres Strait Islander Social Justice Commissioner observed that:

...lack of resources, rather than any problem inherent in the functions of PBCs themselves, is the primary concern expressed by native title holders and others in relation to the operation of PBCs.<sup>104</sup>

3.97 The lack of adequate resourcing of PBCs was also highlighted during the PJC's inquiry into NTRBs. The PJC considered that:

PBCs need to be adequately funded and resourced so that they can fulfil their important role in the native title system. Currently, many PBCs are unable to function effectively because of a lack of financial assistance from the Commonwealth.<sup>105</sup>

3.98 The PJC recommended that:

- the Commonwealth examine appropriate means for resourcing the core responsibilities of Prescribed Bodies Corporate; and
- the Commonwealth, state and territory governments widely publicise the availability to Prescribed Bodies Corporate of different funding sources, particularly in relation to the PBCs' land management functions.<sup>106</sup>

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101 MCA, *Submission 4*, pp [4-5]; NNTC, *Submission 9*, pp 3, 14-15; Dr James Weiner, *Submission 11*, p. 3; see also Aboriginal and Torres Strait Islander Social Justice Commissioner, *Submission 10*, pp 38-39; Mr Philip Vincent, *Committee Hansard*, 30 January 2007, p. 12.

102 *Committee Hansard*, 30 January 2007, p. 36.

103 *Committee Hansard*, 30 January 2007, p. 36.

104 *Submission 10*, p. 38.

105 PJC Report, p. 80.

106 PJC Report, p. 80, Recommendations 18 and 19.

3.99 The Attorney-General's Department and FaCSIA submitted that a number of measures are being implemented to improve the resources and support available to PBCs. A representative of FaCSIA further told the committee that:

The government has decided in principle that, in certain circumstances, prescribed bodies corporate will be funded. We are working on the circumstances.<sup>107</sup>

***Committee view***

3.100 The committee notes concerns raised in relation to Schedule 3, and in particular, the importance of adequate funding and resourcing of PBCs. The committee endorses the comments made in relation to this issue by the PJC in its report on NTRBs, and notes that the Government has accepted the PJC recommendations.<sup>108</sup>

3.101 The committee welcomes the Government's decision in principle to fund PBCs in certain circumstances. The committee notes that the Government is working to determine the circumstances under which funding will be granted. The committee recommends that these funding arrangements be finalised as a high priority.

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107 *Committee Hansard*, 30 January 2007, p. 66.

108 Government Response to the Report by the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Account on the Operation of Native Title Representative Bodies, pp 11-12, tabled 15 February 2007.