



# Chapter 3

## Changes to representative Indigenous bodies

It is crucial to the functioning of the native title system that there are organisations representing Indigenous people and assisting them to gain recognition and protection of native title. The *Native Title Act 1993* (Cth) (the Native Title Act) provides for two main types of organisations to assist Indigenous people with native title, and land and water issues:

- representative Aboriginal and Torres Strait Islander bodies (representative bodies or NTRBs); and
- corporate bodies which may hold and manage native title (referred to as prescribed bodies corporate (PBCs) which may become registered native title bodies corporate (RNTBCs)).

As part of its changes to the native title system, the previous government announced changes to representative Aboriginal and Torres Strait Islander bodies that deal with native title, and prescribed bodies corporate. The changes to representative Aboriginal and Torres Strait bodies are considered in this chapter. I consider the changes to prescribed bodies corporate in a later chapter.

Without these organisations the native title system would stop, and Indigenous people would be prevented from accessing their native title rights and interests. Exploration companies and those wishing to mine and develop land may not be able to gain clearance of native title issues. There would be no certainty the agreements they make are with the people recognised to speak for country. Consent determinations of native title would not be reached and there is high potential that Indigenous peoples would be exploited by unscrupulous parties.

Such organisations enable traditional owners to gain protection and recognition of their native title rights. If they work well they assist traditional owners to meet two basic needs:

- to look after their country; and
- to ensure that their country provides a future for them.

When Indigenous people control the organisations they offer the opportunity to provide models of Indigenous participation in decision-making. This allows for the exercise of the right to effective participation and the right to self-determination.



Important points about these organisations include:

- It is imperative that Indigenous corporate bodies be well resourced, including funding, if the native title system is to operate at all. This is essential if the system is to be released from its current gridlock. This has been said by numerous reviews and in previous native title reports of the Aboriginal and Torres Strait Islander Social Justice Commissioner. It cannot be stressed enough.
- Indigenous corporate bodies must be secure, with a solid presence and permanence. They should be respected for the significant statutory bodies they are. Too often they have been treated as secondary organisations in the native title system and subject to high-level discretionary decisions by executive government. In some recent reviews the corporate bodies were not given a central role. This is unacceptable, and was particularly evident in the claims resolution review.
- Transparency, objectivity and predictability in executive decision-making about these corporations are important.
- There is the potential for these organisations to fulfil more of a role in the economic and social development of Indigenous people. It is something I have argued for in my previous reports. In many parts of the country, representative bodies are the main Indigenous organisation responsible for land and sea issues. They are one of the elements of the native title system that could be used beyond their native title claims role. This capacity will only be realised if they are properly resourced and if expertise is developed within them, and retained, to deal with wider responsibilities.

The above points are important if the representative bodies, prescribed bodies corporate, and registered native title bodies corporate are to:

- deliver protection and recognition of native title; and
- assist native title holders to use native title, and the native title system, for economic, social and cultural outcomes.

The points are especially important if representative bodies are to perform a wider function in assisting Indigenous people to fully exercise and enjoy their human rights.

**i** For an organisation to be able to hold native title it must be incorporated and have the characteristics prescribed by regulation. It is known as a prescribed body corporate (PBC). Once the Federal Court has made a determination that it is to hold the native title, it is registered on the Native Title Register held by the National Native Title Tribunal (the tribunal). It is then known as a registered native title body corporate (RNTBC).



## About representative bodies

The main functions of representative bodies are:<sup>1</sup>

- facilitation and assistance;
- certification of applications for determinations of native title, and applications for registration of Indigenous land use agreements;
- dispute resolution;
- notification of people who hold or may hold native title of certain notices relating to land or waters;
- agreement making; and
- internal review: 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.

A key aspect of exercising these functions is to provide assistance to native title claimants and holders to:

- make applications under the Native Title Act (including claimant and compensation applications);
- respond to proposed activity and development on land or waters that may affect native title rights (known as 'future acts'); and
- negotiate Indigenous land use agreements (ILUAs). (These are voluntary and legally binding agreements that are made between one or more groups, and others, about the use and management of land or waters.)

The Native Title Act also confers other functions on representative bodies under Section 203BJ.

### NTRBs and NTSDAs

Under the Native Title Act the Commonwealth Minister for Families, Housing, Community Services and Indigenous Affairs may recognise certain representative Aboriginal and Torres Strait Islander bodies to perform certain functions under the Act. Those bodies the minister recognises to perform all the functions, are known as native title representative bodies (NTRBs).<sup>2</sup>

The government may also fund other bodies or persons to perform some or all of the functions of a representative body.<sup>3</sup> These are referred to as alternative native title service delivery agencies (NTSDAs or NTS).

The abbreviations NTRB and 'representative body' are used to refer to both NTRBs and NTSDAs throughout this chapter.

There are currently 14 NTRBs and three NTSDAs performing functions of representative bodies under the Native Title Act.<sup>4</sup>

The importance of these organisations to the operation of the native title system cannot be stressed enough. The Attorney-General's Department itself recognises that representative Aboriginal and Torres Strait Islander bodies are the key to Indigenous people accessing their native title rights and interests. They are integral to the operation of the whole native title system:<sup>5</sup>



NTRBs are the primary bodies that represent and assist claimants in achieving native title outcomes related to specified lands or waters. The delivery of native title related services and access to the native title system is not limited to NTRBs and those who hold or may hold native title are not obliged to use their services. However, the Government sees NTRBs as playing a key role in the native title system and funding to assist claimants is primarily allocated to NTRBs.

As indicated, those who hold (or may hold) native title are not obliged to use the services of NTRBs. However, the complexity of the Native Title Act and the claims process, the resources needed to pursue a claim and the length of time claims take to resolve, all make it very difficult to pursue a native title claim without using a representative body.

### Funding of representative bodies

The Australian Government provides funding to NTRBs from an allocation of funds provided for the native title system as a whole. The government also provides operational and strategic support so NTRBs can perform their statutory functions in accordance with their approved strategic and operational plans.<sup>6</sup>

This funding is granted by the Department of Families, Housing, Community Services and Indigenous Affairs – through its Office of Indigenous Policy Coordination (OIPC) – under a Program Funding Agreement.

In the last three years, out of the over \$100 million a year spent on the native title system in Australia, native title representative bodies have received an average of \$51 million a year.

| <b>Native title program funding 2006-07<sup>7</sup></b> | <b>\$57,481,968</b> |
|---|---------------------|
| Aboriginal Legal Rights Movement Inc                    | 3,060,660           |
| Cape York Land Council Aboriginal Corporation           | 4,063,579           |
| Central Desert Native Title Services Limited            | 1,012,500           |
| Central Land Council                                    | 3,050,797           |
| Central QLD Land Council Aboriginal Corporation         | 2,450,876           |
| Goldfields Land and Sea Council Aboriginal Corporation  | 4,133,244           |
| Gurang Land Council (Aboriginal Corporation)            | 2,322,237           |
| Kimberley Land Council Aboriginal Corporation           | 94,282              |
| Kimberley Land Council Aboriginal Corporation           | 4,696,020           |
| Native Title Services Victoria Ltd                      | 3,563,124           |



|   |           |
|---|-----------|
| New South Wales Native Title Services Limited   | 4,033,685 |
| Ngaanyatjarra Council Aboriginal Corporation  | 2,648,721 |
| North Queensland Land Council Native Title Representative Body Aboriginal Corporation | 2,745,642 |
| Northern Land Council   | 2,074,465 |
| Queensland South Native Title Services Ltd  | 3,374,995 |
| South West Aboriginal Land and Sea Council Aboriginal Corporation                     | 3,507,707 |
| Carpentaria Land Council Aboriginal Corporation (Tony Grieves as Administrator for)   | 3,679,263 |
| Yamatji Marlpa Barna Baba Maaja Aboriginal Corporation                                | 6,970,171 |

|   |                     |
|---|---------------------|
| <b>Native title program funding 2005-06<sup>8</sup></b>                               | <b>\$48,107,304</b> |
| Aboriginal Legal Rights Movement Inc  | 2,753,647           |
| Cape York Land Council Aboriginal Corporation   | 3,320,000           |
| Carpentaria Land Council Aboriginal Corporation                                       | 3,141,200           |
| Central Land Council  | 2,565,177           |
| Central Queensland Land Council Aboriginal Corporation                                | 2,525,000           |
| Goldfields Land and Sea Council Aboriginal Corporation                                | 3,447,000           |
| Gurang Land Council (Aboriginal Corporation)  | 2,191,700           |
| Kimberley Land Council Aboriginal Corporation   | 3,815,716           |
| Native Title Services Victoria Ltd  | 2,430,865           |
| New South Wales Native Title Service  | 3,246,760           |
| Ngaanyatjarra Council Aboriginal Corporation  | 2,524,583           |
| North Queensland Land Council Native Title Representative Body Aboriginal Corporation | 2,483,200           |
| Northern Land Council   | 2,761,216           |



|   |           |
|---|-----------|
| Queensland South Native Title Services Ltd                        | 1,922,700 |
| South West Aboriginal Land and Sea Council Aboriginal Corporation | 2,926,560 |
| Yamatji Marlpa Barna Baba Maaja Aboriginal Corporation            | 6,051,980 |

|   |                     |
|---|---------------------|
| <b>Native title program funding 2004-05<sup>9</sup></b>                               | <b>\$47,406,064</b> |
| Aboriginal Legal Rights Movement Inc  | 2,832,700           |
| Cape York Land Council Aboriginal Corporation   | 3,406,400           |
| Carpentaria Land Council Aboriginal Corporation                                       | 2,978,000           |
| Central Land Council  | 2,563,600           |
| Central Queensland Land Council Aboriginal Corporation                                | 2,630,500           |
| Goldfields Land and Sea Council Aboriginal Corporation                                | 3,209,000           |
| Gurang Land Council (Aboriginal Corporation)  | 1,958,000           |
| Kimberley Land Council Aboriginal Corporation   | 3,680,391           |
| Native Title Services Victoria Ltd  | 2,537,930           |
| New South Wales Native Title Service  | 3,368,493           |
| Ngaanyatjarra Council Aboriginal Corporation  | 2,582,750           |
| North Queensland Land Council Native Title Representative Body Aboriginal Corporation | 2,274,200           |
| Northern Land Council   | 2,683,540           |
| Queensland South Representative Body Aboriginal Corporation                           | 1,612,190           |
| South West Aboriginal Land and Sea Council Aboriginal Corporation                     | 3,358,900           |
| Yamatji Marlpa Barna Baba Maaja Aboriginal Corporation                                | 5,729,470           |

The government works out the amount of funding each individual NTRB receives, after consideration of a number of factors. The former Minister for Indigenous Affairs stated that the amount of funding NTRBs receive to deliver their services for the 2005-2006 income year was determined on the basis of operational plans



developed by NTRBs (which estimate the cost of implementing their prioritised activities).<sup>10</sup>

In the 2005-2006 year, the Kimberley Land Council (KLC) gave an example of the practical process through which their funding was determined:<sup>11</sup>

In accordance with the provisions of the NTA the KLC Executive Committee and staff are involved in an annual process of selecting and giving priority to all matters arising from its statutory functions. KLC also meets with the National Native Title Tribunal and the Western Australian Office of Native Title to agree to prioritisation of work programs currently before the Federal Court of Australia. Staff and financial resources are allocated and claims are progressed in the reporting period in accordance with the priority assigned. *It should be noted that the requests placed on the KLC for assistance to progress Native Title activities from our members far exceed the resources available.* [emphasis added]

### Amount of funding

NTRBs play an essential role in the native title system. Without these bodies, Indigenous people would not be able to access their native title rights and interests. Without them the system would grind to a halt. Adequate funding of NTRBs to ensure they can fulfil their many and varied functions is essential to the operation of the whole system:<sup>12</sup>

The under-funding of NTRBs means that, in representing the native title claim group, they are compelled to put their scarce resources into the immediate demands of the native title system rather than fully engage in the various levels of negotiation triggered by the native title process. Consequently NTRBs cannot maximise the capacity of native title agreements to lay the foundation for the achievement of Indigenous peoples' human rights...

The inadequate funding of NTRBs relative to their functions has had the cumulative effect of undermining their capacity to fully and effectively engage in the native title process. In addition, the distribution of funds to other institutions and individuals within the native title system also affects the way in which NTRBs must allocate the scarce resources they do receive. Of increasing concern is the way in which the government's allocation of funds to third parties wishing to participate as respondents in the native title claim process is funnelling NTRBs resources towards litigation rather than addressing the needs of the claimant group.

Yet for many years the situation of funding of NTRBs and the inadequacy of funding has been an issue highlighted by all interested in native title, including lawyers, industry representatives, Social Justice Commissioners and NTRBs. Rio Tinto believes:<sup>13</sup>

... the most significant reason for these difficulties [those of delays caused by the limited capacity of some NTRBs and their ability to engage effectively in native title negotiations] and the resulting constraints on the effective operation of the native title system, is the inadequate resourcing of NTRBs.

The Minerals Council of Australia considers that NTRBs are 'chronically under resourced'.<sup>14</sup>

Various reviews of NTRBs have confirmed these statements, recommending that funding of these bodies be reviewed and ultimately increased. The most recent review is by the Parliamentary Joint Committee on Native Title and the Aboriginal



and Torres Strait Islander Land Accounts. The Committee's *Report on the operation of Native Title Representative Bodies* was finalised on 21 March 2006 (the *NTRB Report 2006*). The recommendations in the *NTRB Report 2006* are considered later in this chapter.

## Previous reviews of NTRBs

A summary of reviews that have occurred over the past decade (in 1994, 1998, 2001, 2002, 2003 and 2006) reinforces the message that NTRBs need to be resourced to perform their functions properly. Generally they have not been.<sup>15</sup>

### ***Parker report***<sup>16</sup>

In November 1994, the Parker report was presented to government. This report looked at the effectiveness of NTRBs. It addressed:

- staffing;
- measures to maximise appropriate native title services to Indigenous people; and
- the appropriateness of financial and administrative arrangements then in place for NTRBs.

Even at that early stage of the native title system, the report found that representative bodies had become 'the workhorses of the native title regime'.

The report recommended:

- NTRBs should be the first point of contact for all Indigenous people seeking to have their native title recognised;
- explicit mandatory functions should be established; and
- representative bodies should be adequately resourced.

### ***Love-Rashid report***<sup>17</sup>

Presented to government in 1998, the Love-Rashid report looked at the relationship between funding levels and functions of NTRBs. It assessed their future funding and resource requirements in the light of the 1998 amendments to the Native Title Act. The report found that:

- workloads of representative bodies were significantly higher than allowed for by the level of funding provided;
- many representative bodies were unable to fulfil their core functions and also provide professional management and administrative systems;
- corporate governance within representative bodies was generally deficient; and
- the shortcomings of the representative bodies imposed considerable costs on the wider community.

### ***PJC report on ILUAs***<sup>18</sup>

In September 2001 the Parliamentary Joint Committee on Native Title published its report on Indigenous land use agreements (ILUAs). NTRBs play a critical role in the negotiation of ILUAs. The committee found that they are hampered by significant





shortages of funds. As a result NTRBs have been forced to rely on funding assistance from proponents as well as state and local governments. The report recommended an increase in funding to NTRBs. The committee also noted difficulties that NTRBs have in securing qualified and experienced staff to manage the processes for which the bodies are responsible.

### ***Miller report***<sup>19</sup>

In July 2002 the Miller report reviewed the NTRB system at the request of the minister. The review was to determine whether the minister was meeting his obligations under the Native Title Act for representative bodies. The review considered the quality of NTRBs strategic plans and the system for distributing funds to representative bodies. The report concluded that all the minister's responsibilities under the Act had been met, with the exception of the requirement to table annual reports of representative bodies in both Houses of Parliament. However, the review found:

Neither the strategic plans, funding applications nor annual reports of NTRBs contained sufficient information to enable the then functioning ATSIC to base its funding allocations on quantifiable outputs/outcomes; and

ATSIC funding to NTRBs addressed known native title funding needs but it raised concerns that such funding was not fairly distributed among NTRBs on the basis of relative need.

The report made a number of recommendations to improve the funding process for NTRBs. The recommendations contained a requirement for operational plans to be included in annual funding applications. This was to give effect to strategic plans and to provide much needed performance information.

### ***Prosser report***<sup>20</sup>

In August 2003, the House of Representatives Standing Committee on Industry and Resources report on resource exploration in Australia was tabled in Parliament. The report found that the native title processes were leading to considerable delays, expense and uncertainty in determining mining applications. A significant cause of these problems was competing and overlapping native title claims. The report recommended that NTRBs be provided with additional funding, targeted and limited to support activities that facilitate negotiation processes.

### ***PJC report on the effectiveness of the National Native Title Tribunal***<sup>21</sup>

In December 2003 the Parliamentary Joint Committee on Native Title reported on the effectiveness of the National Native Title Tribunal. The report noted that NTRBs have central responsibility for the resolution of overlapping claims and intra-Indigenous disputes and recommended that a further inquiry be conducted into the work demands and funding of NTRBs.

### ***PJC report on NTRBs***

The Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Accounts reported on the operation of native title representative bodies on 21 March 2006 (the *NTRB Report 2006*). (The reference to the *NTRB Report 2006* includes reference to the dissenting report of the committee.)



## The NTRB Report 2006

The changes to representative Aboriginal and Torres Strait Islander bodies resulting from amendments to the Native Title Act need to be considered in light of the recommendations in the *NTRB Report 2006*. This is the most recent report on NTRBs. It is a comprehensive review of the issues and difficulties faced by NTRBs. The report was released prior to the 2007 amendments to the Native Title Act impacting on NTRBs and PBCs.<sup>22</sup>

The committee looked at the capacity of NTRBs to discharge their responsibilities under the Native Title Act, examining their:

- structure and role;
- funding and staffing; and
- relationships with other organisations.

The committee made 19 recommendations.

I support the recommendations in the majority report. The recommendations must however, be expanded to incorporate the discussion and recommendations made by the minority in their dissenting report, particularly those for funding NTRBs.

From the report I draw the conclusions that:

- in NTRBs, there is a strong need to develop skills, and conduct training in management and corporate governance;
- the chronic under-resourcing of NTRBs must be addressed, particularly for statutory functions like agreement-making.

I note they are still valid. These conclusions are also supported by correspondence received by me from NTRBs in compiling this report.

The previous government commenced implementation of some of the recommendations in the *NTRB Report 2006* through funding the Casten Centre for Human Rights Law and the Aurora project. Particularly, those recommendations concerning staffing and capacity building (recommendations 10, 11, 12, and 14) were addressed through the Aurora project. I commend that action and the work of the Aurora project generally. The Aurora project is currently being reviewed by the government as it is on limited term funding which expires on 30 June 2008.

I also support the dissenting view that a broad interpretation of the agreement-making function should form the basis of any review of NTRB funding levels. Further, this should reflect 'the established scope of Indigenous Land Use Agreements, which have been used to achieve social and economic objectives.'<sup>23</sup> Indigenous land use agreements (ILUAs) are increasingly used for a wide range of matters.

There are however a number of recommendations in the *NTRB Report 2006* that the government did not accept, or accepted in part, which I believe need to be fully acted upon.<sup>24</sup>

The government did not accept recommendation 2, that the Commonwealth establish an independent advisory panel to advise the minister on the re-recognition of NTRBs once their recognition period has expired. I am concerned that this recommendation was not acted upon and recommend such action now be taken. I refer to this again later in this chapter.



The recent changes to the Native Title Act affecting representative bodies increase the discretionary power given to executive government. It is particularly so with recognition of representative bodies. There is a need for an independent advisory panel to have input into the decision by the minister to re-recognise a representative body. It is necessary to ensure that there is at least some check on the minister's decision-making to avoid the perception that it may be influenced by political considerations.

A number of recommendations were made to increase or review funding. The dissenting report was very forceful in driving home the urgent and ongoing need for increased funding for NTRBs.

### **NTRB review's recommendations on funding**

Of the recommendations regarding funding made by the majority of the committee, recommendations five and six were accepted, in part, and recommendation eight was not.

- *Recommendation 5:* The Commonwealth immediately reviews the adequacy of the level of funding provided by the OPIIC to NTRBs for capacity building activities including management and staff development, and information technology.
- *Recommendation 6:* The Commonwealth, in conjunction with industry groups, consider providing additional pooled funding for emergency and unforeseen situations, such as future act matters, litigation or court proceedings; and that the OIPC develop guidelines and procedures that will enable funding to be available in these situations in a timely fashion.
- *Recommendation 8:* 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.

Other recommendations supported these by proposing ways to increase the expertise, capacity and retention of NTRB staff. These included seconding expert staff, monitoring salaries, and pooling professional staff.

The government accepted recommendation 5, in part. It is my view that the capacity of NTRBs needs to be significantly increased if they are to fully perform their functions, including new administrative work they will need to do to support PBCs and registered native title body corporates as a result of the changes to the native title scheme.

In its response to recommendation 6, which it accepted in part, the government stated it was 'not aware of any evidence to support the need for additional pooled funding for future acts and is not aware of any evidence of emergency arising'. In preparing this report I have received correspondence from NTRBs that suggests otherwise.

In areas where there is significant mining activity, NTRBs are under increasing pressure to deal quickly with mining companies across the whole range of native title work, including future acts. As one NTRB put it '[I]f we do not give our clients



the time and money to deal with Mining industry demands, our clients will be lost in a process that does not adequately accommodate them.<sup>25</sup>

The stresses this places on NTRBs was brought home to me in communications from Yamatji Marlpa Barna Baba Maaja Aboriginal Corporation, Yamatji Land and Sea Council, and Pilbara Native Title Services. They informed me of the huge workload and stresses placed on NTRB lawyers and staff. They often have to travel very long distances to get to meetings in often very unpleasant conditions. They are often 'yelled at, abused, criticized, ridiculed and in some cases assaulted because of the message they have to deliver. The Traditional Owners receiving this advice are extremely frustrated by a world out of step with their own and often take out their frustrations on the NTRB lawyers.'<sup>26</sup>

To handle these pressures and to continue to perform the valuable functions they are required by law to do, NTRBs require support and resourcing.

The previous government did not accept recommendation 8. It declined to immediately review the level of operational funding provided to NTRBs.

There is little doubt that funding of NTRBs is inadequate – the matter comes up too often in reviews of Indigenous bodies. It doesn't matter whether it is for dealing with future acts, or for supporting PBCs before they become RNTBCs – the funding is inadequate. It is past the time to properly fund NTRBs. The Native Title Coordination Committee, chaired by the Attorney-General's Department is currently reviewing funding of the whole native title system. I refer to the recommendations at the end of this chapter.

## The changes to representative bodies

As part of its widespread changes to the native title system, first announced in 2005, the government said it was going to make changes to Indigenous representative bodies. Its stated aims were to ensure the bodies operate with greater effectiveness and accountability.<sup>27</sup> Amending the Native Title Act in 2007 made the changes. The legislative amendments were largely made by the *Native Title Amendment Act 2007* (Cth), Schedule 1.

The main changes dealt with:

- recognition of representative bodies;
- extending, varying and reducing representative body areas;
- bodies eligible to be representative bodies;
- strategic plans and annual reports;
- native title service providers; and
- funding.

The previous government also considered a reduction in the number of representative bodies.

Any changes to representative bodies can affect their capacity to effectively and independently carry out their functions on behalf on native title claimants and holders. Because the functions include claiming native title and responding to future act notices, the changes impinge on Indigenous peoples' exercise and enjoyment of human rights. The changes should be looked at with the recommendations of both the majority and the dissenting *NTRB Report 2006* in mind.



It is crucial to the operation of the Native Title Act, and the systems underpinning it, that representative bodies are set-up, maintained and resourced properly so that they are able to fully carry out their functions. I have concerns about the changes to representative bodies.

### Concerns

- The possible reduction in the opportunity for Indigenous people to participate fully in decisions that affect their lives. This concern arises from changes allowing non-Indigenous corporations to perform the functions of representative Indigenous bodies.
- The administrative burdens faced by representative bodies when they are not provided with any additional funding to adjust to the changes.
- Erosion of the independence of NTRBs from the executive government arising from the requirements for re-recognition. Representative bodies are often in conflict with government over native title. It is important, therefore, to maintain as much independence of representative bodies from government as possible. NTRBs must be free of perceived or actual pressure from government over how they pursue the recognition and protection of native title. NTRBs are already dependent on government for funding and for recognition. It is important that changes to the native title system increase the autonomy of NTRBs from government interference, not reduce it.
- The erosion of security of status resulting from short fixed term recognition periods.
- The need for transparent, objective and predictable decision-making about representative bodies. This is necessary to ensure administrative fairness, and to ensure representative bodies are not intimidated into not pursuing the interests of their clients for fear of funding cuts or de-recognition.
- The inadequate funding and resourcing of representative bodies.
- The lack of open, full consultation with representative bodies about the changes. Consultation with NTRBs and other stakeholders took place prior to the changes. However, some NTRBs have criticised the past government for a lack of proper consultation, where they felt that the government had already made up its mind about the changes.



## ***Background to the changes***

The changes were designed to:

- enhance the quality of service by broadening the range of organisations that can undertake activities on behalf of claimants;
- streamline the process for withdrawing recognition from poorly-performing representative bodies and appointing a replacement body;
- put a time limit on the recognised status of representative bodies to ensure a focus on outcomes (while ensuring that all existing representative bodies are initially invited to be recognised for between one and six years);
- reduce red-tape by removing the requirement for representative bodies to prepare strategic plans and table their annual reports in Parliament;
- ensure that entities funded to perform representative body functions can provide the same services as representative bodies;
- make it easier to change representative body areas;
- provide representative bodies with multi-year funding to assist their strategic planning; and
- improve accountability for the expenditure of public funds.<sup>28</sup>

### **Recognition of representative bodies**

Representative bodies are now recognised for limited, fixed terms of between one and six years. I am concerned at the degree to which the changes provide for significant ministerial discretion in the recognition of eligible bodies. This opens the way for the perception and possibility of political pressure.

#### ***Fixed term recognition***

I am concerned about the introduction of fixed term recognition periods. Prior to the changes, eligible bodies were recognised for an unlimited period. The changes provide for fixed terms of between one and six years.

A minimum period of one year may be granted in certain circumstances, including where the minister is of the opinion that one year would promote the efficient performance of the functions of a representative body (which are set out in Section 203B(1)).<sup>29</sup>

In order to be recognised an eligible body must be invited by the minister to apply for recognition.<sup>30</sup>

Under the changes the minister may invite applications from eligible bodies for recognition as the representative Aboriginal and Torres Strait Islander body for an area. The invitation may specify the period for which an eligible body would be recognised. The minister is not obliged to invite applications for recognition from representative bodies that have already been recognised (other than during the transition period).



A transition period, 15 April 2007 to 30 June 2007, was set under the amendments to allow for the introduction of the changes to representative bodies. Representative bodies that existed at 15 April 2007 were invited by the minister to apply during the transition period to be recognised for their areas.

On 7 June 2007 the former Minister for Families, Community Services and Indigenous affairs announced new recognition periods for NTRBs around Australia. These came into effect on 1 July 2007. These recognition periods are set out in the following table.<sup>31</sup>

| <b>Recognition periods for NTRBs</b> |  |              |
|--------------------------------------|--|--------------|
| <b>State</b>                         | <b>NTRB</b>  | <b>Years</b> |
| WA                                   | Kimberley Land Council                                 | 6            |
|                                      | Yamatji Marlpa Barna Baba Maaja Aboriginal Corporation | 4            |
|                                      | Goldfields Land and Sea Council                        | 3            |
|                                      | South West Aboriginal Land and Sea Council             | 1            |
| NT                                   | Northern Land Council                                  | 6            |
|                                      | Central Land Council                                   | 6            |
| SA                                   | Aboriginal Legal Rights Movement (ALRM)*               | 1            |
| QLD                                  | Cape York Land Council                                 | 3            |
|                                      | North Queensland Land Council                          | 6            |
|                                      | Carpentaria Land Council                               | 1            |
|                                      | Gurang Land Council                                    | 1            |
|                                      | Central Queensland Land Council                        | 1            |
|                                      | Torres Strait Regional Authority                       | 6            |

(Victoria, New South Wales and Queensland South are currently served by organisations funded under Section 203FE(1) of the Native Title Act which are not subject to NTRB recognition processes. The area currently covered by Ngaanjatjarra Council (WA) will operate under similar arrangements from 1 July 2007).

\* Under mutually agreed transitional arrangements, the Aboriginal Legal Rights Movement (ALRM of South Australia) will only continue to operate as a NTRB for another year.



In determining the new recognition periods for NTRBs, records of activities, the overall stability of the organisation, and financial management were examined. According to the minister poor performance or governance issues had in the past affected those NTRBs receiving mid-range terms. Major changes were also envisaged to NTRBs in Queensland. Gurang, Central Queensland and Carpentaria Land Councils and Queensland South Native Title Services were in discussion (prior to the change of government) about creating a new larger organisation. A new body was planned to be operating from 1 July 2008.<sup>32</sup>

I am concerned that the imposition of limited fixed term recognition periods can increase the workload of representative bodies. Those who receive a short period may well find that a large amount of their time is taken up applying for re-recognition. A much longer minimum period for recognition, at least three years, increases the stability and standing of representative bodies as long-term organisations. This has ramifications for attracting and retaining staff, a key issue for representative bodies.

The vulnerability to short recognition periods undermines the ability of representative bodies to make medium to long-term plans that are essential if representative bodies are to be effective. Short recognition periods reinforces the perception that representative bodies are insecure, temporary organisations whose existence is dependent upon ministerial discretion and political expediency. Consequentially it is very difficult for them to build a profile and operate as respected, long-term organisations. There are ramifications for all participants in the native title system who deal with Indigenous people and their rights and interests in land and waters.

### ***Recognising***

Following the changes, in recognising an eligible body as a representative body, the minister only needs to be satisfied that the body is, or will be able to, perform the functions of a representative body satisfactorily.<sup>33</sup>

The minister is no longer required to consider:

- 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 Indigenous peoples living in its area.

The recognition by the minister is by 'legislative instrument'. While this allows for review by the Australian Parliament, it precludes review under the *Administrative Decisions (Judicial Review) Act 1977*. Prior to the amendments the decision had been an administrative decision.

### ***Withdrawing recognition***

As a result of the changes the minister must now withdraw recognition if the body ceases to exist or it makes a written request to the minister for the recognition to be withdrawn.





The minister may withdraw recognition if satisfied either:

- the body is not satisfactorily performing its functions; or
- there are serious or repeated irregularities in the financial affairs of the body.<sup>34</sup>

The *NTRB Report 2006* recommended the Australian Government establish an independent advisory panel to advise the minister on the re-recognition of NTRBs once their recognition period has expired (recommendation 2).<sup>35</sup>

## **Representative body: Operation areas**

### ***Extending, varying and reducing representative body areas***

The minister may extend or vary the area covered by a representative body. This may be on the application of a representative body or bodies, or on the minister's own initiative. Before doing so the minister must give sixty days notice to the body and the public that an extension or variation is being considered, and invite submissions. The minister must consider any resulting submissions. The minister must also consider any reports of audits or investigations into funding.<sup>36</sup>

In extending or varying the area covered by a NTRB, the minister must be satisfied that, after the extension or variation, the representative body will satisfactorily perform its functions<sup>37</sup> in the modified area.

For reducing areas, the minister is required to be satisfied that a representative body is not satisfactorily performing its functions.<sup>38</sup>

## **Bodies that are eligible to be representative bodies**

Under the changes non-Indigenous corporations are eligible to be recognised and funded as a NTRB. The changes have added a company incorporated under the *Corporations Act 2001* (Cth) as a body eligible to be recognised to perform the functions of a representative body.

This was done to meet concerns that restricting NTRBs to Indigenous corporations results in:

- problems with governance;
- inadequate separation of powers; and
- conflicts of interest.

It is important, however, to keep in mind human rights, especially those of self-determination and to control decision-making affecting Indigenous land and institutions. These must be considered when looking at the eligibility of non-Indigenous corporations to be recognised to perform the functions of a representative body. The recognition of non-Indigenous corporate bodies to perform these functions may negatively impact on the credibility of those organisations. This may lead to conflict between directors, members and the NTRBs clients. Concerns about governance of Indigenous corporations ought to be adequately dealt with by application of the provisions of the new *Corporations (Aboriginal and Torres Strait Islander) Act 2007* (Cth) (the CATSI Act), which deal with adequate funding and capacity and governance building.



## Statutory plans and annual reports

Statutory plans and annual reports are no longer required by NTRBs. However, the Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA) may continue to insist on planning and reporting as conditions of funding. This was part of the endeavors of the previous government to reduce the red tape the representative bodies had to deal with. It is a worthwhile objective.

However, I have concerns that the removal of the requirements for statutory plans and annual reports will:

- negatively impact on the perception of the decision-making of representative bodies. Statutory plans provide a sound basis on which to make, and be seen to be making, difficult, transparent, fair decisions based on an objective standard.
- reduce the ability of representative bodies to present as credible, professional, long term organisations. Annual reports are a way of presenting to the world the work of an organisation and what it is about. Internally they provide a mechanism whereby people can understand what the organisation they work for does, how it operates, and how it is structured. It also allows clients of the organisation and the public to understand the structure of the organisation and it is a record of the workings of the organisation and its rationale for existence.

Problems with statutory plans such as their perceived lack of usefulness, their quality, and the resources taken to prepare them, are better solved by resourcing representative bodies to engage experts to assist in the preparation of plans, and to guide representative bodies in their use.

I understand the Aurora Project is developing training in this area for supporting representative bodies in the preparation of statutory plans.

Similar arguments are applicable to the preparation of annual reports.

## Changes to funding

The funding of representative bodies has been changed:

- removal from the Native Title Act of certain accountability requirements for funding previously imposed by FaHCSIA;
- expansion of FaHCSIA's discretion to provide funds;
- relaxation of the basis upon which an auditor or investigator may be appointed; and
- funding is now available on a multi-year basis, rather than year by year.

There was no increase in the level at which representative bodies were funded in the 2006-2007 financial year. Inadequate funding of NTRBs has, and continues to, undermine the capacity of NTRBs to provide effective representation and assistance. This diminishes the extent to which Indigenous people have been able to secure recognition and enjoyment of their rights. My concerns about the funding and resourcing of representative bodies are set out earlier in this chapter.



## Kimberley Land Council

The Kimberley Land Council (KLC) – an NTRB from the Kimberley region in Western Australia – commented in their 2005-2006 annual report on a number of resourcing related issues that they face. Their story illustrates the many and varied issues NTRBs face that are exacerbated by inadequate funding.

Over the 2005-2006 income year, the KLC received funds of \$4,215,000 from the government. They received \$413,000 from other sources.<sup>39</sup> This total budget of just over \$4.5 million provided for 47 staff members (15 positions were funded through grants other than the OPIC's NTRB funding). Over \$1 million was spent on consultancy services (legal, anthropological and other consultancy services).<sup>40</sup>

The NTRB operates over approximately 412,451 square kilometres, covering four local government areas, with six major towns, and some 200 Aboriginal communities. This vast region's economy relies heavily on mining, tourism, agriculture and the pastoral, pearling and fishing industries.

The annual report said:<sup>41</sup>

The KLC's 2005–2006 Operational Plan sought to establish a balance between demand and resources. However the resources, human and financial, available to the KLC were limited. The KLC's capacity to progress all claims and to respond to all issues, including land access, was governed by resources. Any reduction in resources affects KLC's performance.

The substantial reduction in staff numbers in the reporting period 2003–2004 continued to affect the amount of work that could be undertaken by the KLC. Ensuring that constituents and third parties have realistic expectations of the KLC's capacity, and understand workload pressures, remains an ongoing issue.

As a result of the reduced staff numbers the KLC's centralisation of service delivery from the KLC's Broome and Kununurra offices has reduced the KLC's ability to service more remote areas. Effectively, each office must service an area in excess of 200,000 square kilometres... As an example, travel between Broome and Kununurra for Executive meetings involves two days' driving. This significantly adds to costs, and has a marked effect on human resources.

While the KLC continues to progress those matters in the litigation stream, the financial and human resources available to progress other matters in mediation, and to respond to future acts, remained limited during the reporting period. The reduction in staffing levels has intensified the demands on remaining staff to respond to the range of statutory functions. This has placed extremely high workload pressure on remaining staff in the organisation.

... An ongoing issue for the KLC is the strong demand on the labour market created by the ongoing growth and development of industries in the Kimberley region, in particular industries associated with the mining and resources boom in Western Australia. The KLC is not in a position to compete in the current labor market with other employers, primarily because it cannot offer salary packages which are commensurate with those offered in both the public and private sectors to experienced and less experienced professional staff. This lack of competitiveness is exacerbated by the high cost of living, including rental accommodation, in the Kimberley.



In the current reporting period, the KLC has continued to experience difficulty recruiting and retaining experienced support staff. The highly competitive labor market, exacerbated by the high cost of living in the Kimberley was again the significant factor. This has had a particular impact on the KLC's capacity to recruit staff.

The KLC's physical office accommodation remains below standards that are conducive to efficiency, safety, and productivity. The inability of KLC to secure capital to upgrade its office accommodation continues to negatively affect the organisation's outputs and performance.

Yet over the 2006-2007 income year the KLC's budget was reduced by \$1,055,097 (20%) from the requested amount.<sup>42</sup>

That level of funding did not allow for the re-opening of its other two offices. The result was that KLC staff had to travel extensively, and the total travel costs exceeded \$1 million – a significant proportion of the KLC's expenditure.<sup>43</sup>

## What is needed?

NTRBs must be perceived by the government and dealt with as the significant statutory corporations they are. They must be:

- made secure and given a sense of permanence and stability;
- fully resourced and funded to perform their functions; and
- free from wide-ranging ministerial exercise of discretionary power.

## Recommendations

- 3.1** That the Australian Government immediately initiate a review that is at arm's length from government, to recommend the level of operational resourcing for NTRBs to ensure that they are well able to meet their performance standards, and fulfil their statutory functions.
- 3.2** That the minimum recognition period for representative bodies be increased to three years.
- 3.3** That the Australian Government establish an independent panel to advise the Minister for Families, Housing, Community Services and Indigenous Affairs on recognition, re-recognition, and withdrawal of recognition, of NTRBs.
- 3.4** That the Native Title Act be amended to specify criteria for the exercise of ministerial discretion in recognition, re-recognition, and withdrawal of recognition, of NTRBs.
- 3.5** That statutory plans, requiring ministerial approval, be reinstated as compulsory, and the Aurora Project be funded to provide training to representative bodies on the preparation of statutory plans.



- 1 *Native Title Act (1993)* (Cth), Division 3 of Part 11.
- 2 The functions are set out in Division 3 of Part 11 of the *Native Title Act (1993)* (Cth).
- 3 *Native Title Act (1993)* (Cth), s203FE.
- 4 See the NTRB website available at [www.ntrb.net/](http://www.ntrb.net/) for a map and the names and details of the 14 NTRBs.
- 5 Attorney-General's Department, Submission to the Parliamentary Joint Committee on Native Title Representative Bodies, July 2004, available online at: [http://www.aph.gov.au/senate/committee/ntlf\\_ctte/rep\\_bodies/submissions/sublist.htm](http://www.aph.gov.au/senate/committee/ntlf_ctte/rep_bodies/submissions/sublist.htm).
- 6 For further information see the Native Title Representative Bodies website, available online at: [www.ntrb.net/](http://www.ntrb.net/).
- 7 Office of Indigenous Policy Coordination, *Correspondence with Aboriginal and Torres Strait Islander Social Justice Commissioner – request for information in preparation of the Native Title Report 2007*, Email, 15 January 2008.
- 8 Senator Vanstone, *Hansard*, Senate, 8 February 2006, p218.
- 9 Senator Vanstone, *Hansard*, Senate, 8 February 2006, p218.
- 10 Senator Vanstone, *Hansard*, Senate, 8 February 2006, p217.
- 11 Kimberley Land Council, *Annual Report 2006*, Kimberley Land Council, 2006, p9, available online at: [www.klc.org.au/reports.htm](http://www.klc.org.au/reports.htm).
- 12 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2003*, pp159, 161, available online at: [http://www.humanrights.gov.au/social\\_justice/nt\\_report/ntreport03/](http://www.humanrights.gov.au/social_justice/nt_report/ntreport03/).
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- 14 Mineral Council of Australia, Submission to the Parliamentary Joint Committee on Native Title Representative Bodies, July 2004, p1, available online at: [http://www.aph.gov.au/senate/committee/ntlf\\_ctte/rep\\_bodies/submissions/sublist.htm](http://www.aph.gov.au/senate/committee/ntlf_ctte/rep_bodies/submissions/sublist.htm).
- 15 Parliamentary Joint Committee on Native Title and Aboriginal and Torres Strait Islander Land Account, Report on the Operation of Native Title Representative Bodies, Commonwealth of Australia, Canberra, 2006, pp1-4, available online at: [http://www.aph.gov.au/senate/committee/ntlf\\_ctte/rep\\_bodies/report/index.htm](http://www.aph.gov.au/senate/committee/ntlf_ctte/rep_bodies/report/index.htm).
- 16 Parker, G., *Review of Native Title Representative Bodies*, ATSIC, Canberra, 1995, as cited in Parliamentary Joint Committee on Native Title and Aboriginal and Torres Strait Islander Land Account, *Report on the Operation of Native Title Representative Bodies*, Commonwealth of Australia, Canberra, 2006, pp1-4, available online at: [http://www.aph.gov.au/senate/committee/ntlf\\_ctte/rep\\_bodies/report/index.htm](http://www.aph.gov.au/senate/committee/ntlf_ctte/rep_bodies/report/index.htm).
- 17 Rashid, S., *Review of Native Title Representative Bodies*, ATSIC, March 1999, as cited in Parliamentary Joint Committee on Native Title and Aboriginal and Torres Strait Islander Land Account, *Report on the Operation of Native Title Representative Bodies*, Commonwealth of Australia, Canberra, 2006, pp1-4, available online at: [http://www.aph.gov.au/senate/committee/ntlf\\_ctte/rep\\_bodies/report/index.htm](http://www.aph.gov.au/senate/committee/ntlf_ctte/rep_bodies/report/index.htm).
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- 19 Miller, B., *Review of Native Title Representative Body System at the Request of the Minister for Reconciliation and Aboriginal and Torres Strait Islander Affairs*, October 2002, as cited in Parliamentary Joint Committee on Native Title and Aboriginal and Torres Strait Islander Land Account, *Report on the Operation of Native Title Representative Bodies*, Commonwealth of Australia, Canberra, 2006, pp1-4, available online at: [http://www.aph.gov.au/senate/committee/ntlf\\_ctte/rep\\_bodies/report/index.htm](http://www.aph.gov.au/senate/committee/ntlf_ctte/rep_bodies/report/index.htm).
- 20 House of Representatives Standing Committee on Industry and Resources (Mr G Prosser MP, Chair), *Exploring: Australia's Future-Impediments to Increasing Investments in Minerals and Petroleum Exploration in Australia*, August 2003, as cited in Parliamentary Joint Committee on Native Title and Aboriginal and Torres Strait Islander Land Account, *Report on the Operation of Native Title Representative Bodies*, Commonwealth of Australia, Canberra, 2006, pp1-4, available online at: [http://www.aph.gov.au/senate/committee/ntlf\\_ctte/rep\\_bodies/report/index.htm](http://www.aph.gov.au/senate/committee/ntlf_ctte/rep_bodies/report/index.htm).
- 21 Parliamentary Joint Committee on Native Title and Aboriginal and Torres Strait Islander Land Account, *Effectiveness of the National Native Title Tribunal*, December 2003, as cited in Parliamentary Joint Committee on Native Title and Aboriginal and Torres Strait Islander Land Account, *Report on the Operation of Native Title Representative Bodies*, Commonwealth of Australia, Canberra, 2006, pp1-4, available online at: [http://www.aph.gov.au/senate/committee/ntlf\\_ctte/rep\\_bodies/report/index.htm](http://www.aph.gov.au/senate/committee/ntlf_ctte/rep_bodies/report/index.htm).
- 22 Parliamentary Joint Committee on Native Title and Aboriginal and Torres Strait Islander Land Account, *Report on the Operation of Native Title Representative Bodies*, Commonwealth of Australia, Canberra, 2006, available online at: [http://www.aph.gov.au/senate/committee/ntlf\\_ctte/rep\\_bodies/report/index.htm](http://www.aph.gov.au/senate/committee/ntlf_ctte/rep_bodies/report/index.htm).



- 23 Parliamentary Joint Committee on Native Title and Aboriginal and Torres Strait Islander Land Account, *Dissenting report on the Operation of Native Title Representative Bodies*, Commonwealth of Australia, Canberra, 2006, available online at: [http://www.aph.gov.au/senate/committee/ntlf\\_ctte/rep\\_bodies/report/d01.htm](http://www.aph.gov.au/senate/committee/ntlf_ctte/rep_bodies/report/d01.htm).
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- 25 Yamatji Marlpa Barna Baba Maaja Aboriginal Corporation, *Correspondence with Aboriginal and Torres Strait Islander Social Justice Commissioner – Request for Information in preparation of the Native Title Report 2007*.
- 26 Yamatji Marlpa Barna Baba Maaja Aboriginal Corporation, *Correspondence with Aboriginal and Torres Strait Islander Social Justice Commissioner – Request for Information in preparation of the Native Title Report 2007*.
- 27 Ruddock, P., (Attorney-General), *Hansard*, House of Representatives, 7 December 2006, p17.
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- 30 *Native Title Act (1993)* (Cth), s203AB.
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- 32 Brough, M., (Minister for Families, Community Services and Indigenous Affairs), *Reforms to Native Title Representative Bodies to benefit Indigenous Australians*, Media Release, 7 June 2007.
- 33 *Native Title Act (1993)* (Cth), s203AD.
- 34 *Native Title Act (1993)* (Cth), s203AH.
- 35 Parliamentary Joint Committee on Native Title and Aboriginal and Torres Strait Islander Land Account, *Report on the Operation of Native Title Representative Bodies*, Commonwealth of Australia, Canberra, 2006, available online at: [http://www.aph.gov.au/senate/committee/ntlf\\_ctte/rep\\_bodies/report/index.htm](http://www.aph.gov.au/senate/committee/ntlf_ctte/rep_bodies/report/index.htm).
- 36 *Native Title Act (1993)* (Cth), ss203AE, 203AF. The reports the minister is required to consider are set out in s203AE(7) and s203AF(7).
- 37 These are the functions for representative bodies set out in Division 3 of Part 11 of the *Native Title Act (1993)* (Cth).
- 38 *Native Title Act (1993)* (Cth), s203AG.
- 39 Various other organisations operating in the native title system are currently supporting NTRBs, including the bodies with which the NTRB must negotiate. The Minerals Council of Australia estimated that the cost to one mineral company in negotiating one agreement as part of the right to negotiate procedures under the Native Title Act over an eighteen month period was two million dollars – the majority of which was provided to the NTRB to enable them to participate in the negotiations. See Mineral Council of Australia, Submission to the Parliamentary Joint Committee on Native Title Representative Bodies, July 2004, p2, available online at: [http://www.aph.gov.au/senate/committee/ntlf\\_ctte/rep\\_bodies/submissions/sublist.htm](http://www.aph.gov.au/senate/committee/ntlf_ctte/rep_bodies/submissions/sublist.htm).
- 40 Kimberley Land Council, *Annual Report 2006*, Kimberley Land Council, 2006, pp62-63, available online at: [www.klc.org.au/reports.htm](http://www.klc.org.au/reports.htm).
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