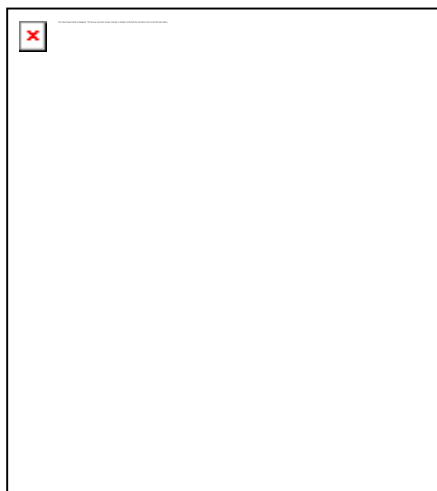


Australian Institute of Aboriginal and Torres Strait Islander Studies

Submission to the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund

Native Title Representative Bodies



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Appendix 1

Executive Summary

AIATSIS welcomes the opportunity to provide background information to the Committee in its deliberations over the inquiry into the capacity of Native Title Representative Bodies (NTRBs). This submission provides information on how AIATSIS contributes to the capacity and coordination of NTRB activities as well as commenting on the roles, functions and resourcing of NTRBs.

Section 1 of this submission provides information about AIATSIS native title activities which are primarily conducted through the Native Title Research Unit. The NTRU was established in 1993 to provide a range of services directed at increasing capacity within the native title sector, particularly native title representative bodies (NTRBs). The NTRU plays a key role in facilitating a whole of government approach to native title working with a wide range of stakeholders across the sector. The NTRU is in a unique position to provide products and services to support NTRBs to ameliorate barriers to the more effective use of resources. In particular the NTRU contributes to the professional development of native title practitioners through the research it conducts, publications and resources it produces and the events and activities it organises.

Section 2 addresses the role and structure of NTRBs, highlighting the need for a system wide analysis of NTRBs to better understand their roles and functions as they have developed over the last decade and to inform policy development and funding decisions. An examination of existing governance and management structures illustrates the need for flexible arrangements which enable NTRBs to respond to the particular needs of their clients.

Section 2 also makes a number of observations about the role of NTRBs arguing that they perform a range of important functions relating to their statutory functions that are currently under-resourced. Such functions include providing native title applicants with diverse options for addressing their native title interests, contributing to Indigenous community development and capacity building, and advocating for the interests of native title groups in consultation, policy development and review processes.

Section 3 addresses the need to increase the levels NTRB funding and the importance of providing NTRBs with greater financial security through the provision of multi-year funding. The issue of funding for Prescribed Bodies Corporate is also discussed within the context of ensuring that native title holders are adequately resourced and supported to exercise their native title rights. **Section 4** reflects on the impact of external parties on NTRB operations and funding models.

Recommendations

Recommendation 1: In order to facilitate the efficient use of program funds in supporting the native title system, especially in building the capacity of native title representative bodies, the Native Title Research Unit should be funded to a level that would maintain current functions and undertake additional work on an induction program for NTRB staff, further training and development opportunities through the National Native Title Conference and projects on land management, anthropological and research practice and governance and representation.

Recommendation 2: That funding for the Native Title Research Unit be provided on a three year cycle to allow long terms planning for larger scale research projects and secure staff appointments.

Recommendation 3: That NTRBs continue to be funded from the performance enhancement program to participate in the annual National Native Title Conference.

Recommendation 4: That the role of NTRBs in advancing a broad range of title outcomes in the negotiation and settlement of native title claims be recognised and resourced.

Recommendation 5: That the role of NTRBs in contributing to Indigenous community development to enable native title groups to participate effectively in native title processes (both pre and post determination) be recognised and resourced.

Recommendation 6: That NTRB funding be increased to \$80-\$85 million per year as recommended in the Love Rashid Report.

Recommendation 7: That NTRBs be funded on a normal cycle of minimum three year funding agreement linked to the Strategic Plan.

Recommendation 8: That funding should be provided either to NTRBs or directly to PBCs to support native title holders to exercise their native title rights.

Recommendation 9: That funding to NTRBs recognise the need for flexibility in responding to the priorities of the government agencies that drive native title processes (State government and Federal Court in particular).

Recommendation 10: That funding to NTRBs take into account the increased intervention of the Federal Court in the progress and management of claims.

1. AIATSIS Native Title Services

The Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) was established in 1964, under Commonwealth legislation. Over the last 40 years AIATSIS has established itself as Australia's premiere Indigenous research institute, manages world class collections of cultural and research material, houses the Aboriginal Studies Press and engages in numerous partnerships with research and government institutions and Indigenous communities. Since 1 July 2004, AIATSIS has been located within the Education, Science and Training portfolio.

As the peak national multi-disciplinary Indigenous research institution, AIATSIS offers an ideal policy research environment. AIATSIS is in a unique position to assist the Australian Government, the native title representative body system and native title holders and claimants in developing, analysing and evaluating policy and practice in an Indigenous context and coordinating information and resources throughout the native title system.

AIATSIS' native title activities are primarily conducted through the Native Title Research Unit (NTRU), which was established in 1993 in response to the High Court decision in *Mabo v Queensland [No.2]* (1992). Over the last 12 years, AIATSIS has received annual funding, from ATSIC, ATSI then OIPC, to provide a range of native title services including:

- identifying research needs arising from recognition of native title and conducting (and commissioning) independent research;
- coordinating, editing, publishing and disseminating research and information on native title issues;
- convening conferences, workshops, professional forums and seminars including for training and professional development;
- facilitating access to the Institute's records, materials and collections;
- monitoring outcomes and developments, assessing the impact of policy and legal developments; and
- providing strategic, timely and effective policy advice.

In recognition of this contribution, AIATSIS received \$850,000 from the Office of Indigenous Policy Coordination (OIPC) in 2004-2005 to conduct a range of activities. While, in 2005-2006, that amount was reduced by 40%, to \$500,000, AIATSIS have been able to continue to provide the range of activities outlined in Appendix 1, as part of the performance enhancement program.

1.1 AIATSIS contribution to the efficient and effective use of resources

AIATSIS notes that the submission from the OIPC to this Inquiry states that: 'OIPC is not necessarily persuaded that insufficient resourcing – as opposed, for example, to more efficient and effective use of existing resources – is at the core of the problem'.¹ Whilst AIATSIS disagrees with the view that the native title representative body system is sufficiently resourced, we recognise that there are impediments to effective and efficient resource use within the NTRB system. A series of reports reviewing various aspects of the NTRB system over the past ten years have identified a number of barriers to the more efficient use of resources including:

¹ OIPC. 2004. *Submission to the Inquiry into the capacity of native title representative bodies to discharge their duties under the Native Title Act 1993*. Office of Indigenous Policy Coordination, Canberra.

- extraordinary workloads and external demands (of courts and respondents) impacting on representation of native title applicants by NTRBs;
- lack of shared understanding of appropriate native title outcomes between stakeholders (which frustrates opportunities for agreements and settlements);
- changing and volatile legal and political environments, including the impact of the new Indigenous Affairs framework;
- recruitment and retention difficulties for all staff, but particularly professional staff;
- staff inexperience, isolation and lack of professional development opportunities;
- the limited knowledge base and decreasing pool of expertise, both working in the NTRB system as well as within universities and professional practice;
- absence of information flows and communication between NTRBs; and
- the need for interdisciplinary/inter-speciality understanding and cooperation.²

Many of these barriers are structural, and are related to the nature and location of the work, the regionalisation of services in the absence of a national body, the particularity of the expertise required and/or developed by NTRB staff and the absence of support from wider professional and academic networks.

AIATSIS, through the NTRU is in a unique position to provide products and services (resources) to support NTRBs to ameliorate or manage these barriers, by:

- playing a national clearing house role by collecting, presenting and distributing information to overcome difficulties of isolation, inexperience and lack of access to resources;
- providing tools for staff induction and ongoing professional education and development informed by national practice;
- providing opportunities for NTRBs to coordinate and discuss issues at a national level as well as opportunities to take a prominent role in collaborative/system wide forums; and
- promoting understanding of Indigenous perspectives on desired and effective native title outcomes

AIATSIS has continued to develop, improve and build upon its expertise and product base since 1993. NTRBs have never received funding to perform these functions and do not have the capacity to carry out these functions. There is a clear benefit to having these support functions centrally located in an institution with the appropriate infrastructure support and without competing native title priorities. Indeed the NTRU functions within the native title system was one of the original 'capacity building initiatives'.

In many instances AIATSIS, is able to respond to needs arising within the NTRB system. For example, recent surveys relating to staff capacity, training and professional development needs within the NTRB system indicate that there is a need

² See ATSIC. 1995. *Review of Native Title Representative Bodies* (the Parker Report). Aboriginal and Torres Strait Islander Commission, Canberra; ATSIC. 1999. *Review of Native Title Representative Bodies* (the Love Rashid Report). Aboriginal and Torres Strait Islander Commission, Canberra; Miller. 2002. *Review of the Native Title Representative Body System undertaken at the request of the Minister for Reconciliation and Aboriginal and Torres Strait Islander Affairs*, (the Miller Review); Martin, D.F. 2004. *Anthropological capacity in native title services: a report to the National Native Title Tribunal*. Anthropos Consulting Services, Canberra; Potok, R. 2005 *A report into the professional development needs of Native Title Representative Body lawyers*. Castan Centre for Human Rights Law, Melbourne.

for a native title induction program to assist newly engaged NTRB staff to gain an understanding of native title processes and practice. Also, AIATSIS' Indigenous Facilitation and Mediation Project has identified mainstream training providers and courses to provide NTRB staff with a range of administrative, legal, communication, dispute management, corporate governance, managerial and financial skills. However, these providers and courses do not address basic areas of native title practice that would provide a relevant and tailored introduction to working in the system.

In response to this identified need, AIATSIS submitted a proposal to OIPC to develop a General Induction Guide and pilot a National Induction Program for NTRB staff. Such an initiative could provide a system wide collaboration engaging and building upon the expertise and resources already available within NTRBs, as well as OIPC, the National Native Title Tribunal (NNTT), Federal Court, and State government agencies as well as engaging with university centres. Unfortunately, this offer has been rejected in favour of seeking an alternative training provider. AIATSIS may be able to provide expert advice and content support to such a program if it is conducted through a provider from without the native title sector.

1.2 AIATSIS contribution to whole of government approach

The new arrangements in Indigenous Affairs have highlighted the need for coordination across government in identifying and delivering successful policy and service outcomes. OIPC Associate Secretary, Wayne Gibbons has noted the need for research investment to support this endeavour. Coordination has, arguably, been a hallmark of the native title sector for some years and AIATSIS, as part of government, has been central to the coordination of research toward this goal.

The NTRU performs a unique role within the native title system and has worked collaboratively with NTRBs and other native title stakeholders including the Federal Court and NNTT. In particular the NTRU plays a major role in facilitating greater coordination and cooperation within the native title system thus contributing to the more efficient and effective use of resources.

Specifically, in devising research programs AIATSIS has been able to link the research priorities of OIPC (ATSIS and ATSIC), the NNTT, Federal Court and Attorney General's Department with those of NTRBs. The research, expertise and resources of the NTRU are utilised by the full gamete of interests in the native title sector, from unrepresented claimants to the Federal Court, and respondents. We are often the first point of call for agencies engaging with native title. The investment in NTRU research activities directly enhances collaboration within the sector and across government.

1.3 Importance of research to inform policy development

The NTRU provides a research base for policy development and for access by the OIPC's core program group, NTRBs. For example, we have provided immediate case commentaries, and urgent advice on native title outcomes and comprehensive agreement proposals in Western Australia and Victoria and water rights. All of these were outcomes of longer term research projects that pre-empted policy developments and priorities.

The NTRU has established a strong reputation for high quality research. Our existing capacity to produce resources of relevance and substance draws on the past

investment in the research capacity of the NTRU and should continue to be underpinned by ongoing research activity. Ideally, a program of research should be developed over a longer term of 12 months-3 years to ensure considered and informed research outcomes (compare, for example, 3 year funding for universities by the Australian Research Council, or 7-9 years for Cooperative Research Centres). Given the timeframes involved in determining native title applications and the need for longitudinal studies to evaluate the implementation, effectiveness and outcomes of agreements AIATSIS argues that their should be multi-year funding made available for native title research activities to conform with the NTRB three year strategic planning cycle (see 3.1).

The notion that research expertise can be bought on a consultancy basis assumes that this underlying research is occurring, and is consistent with the long-term needs and priorities of government and of the program. This is not necessarily the case. Universities are not conducting relevant ongoing research that can be purchased by government, nor does government have the capacity or intention to conduct research to inform policy. As a result, transaction costs and the narrowness of consultancy outcomes will limit the contribution that consultancy based research can make to the needs of the program. Further, AIATSIS is uniquely placed as a government agency to provide policy responsive research that cannot be guaranteed through commissioned university research.

The NTRU is also seeking to increase coordination and collaboration in regard to native title research across the sector. Earlier this year AIATSIS surveyed native title researchers within or affiliated with federal government agencies and the academy to identify current native title research projects, identify native title research priorities and seeking suggestions as to how opportunities for collaborative research with NTRBs might be increased. AIATSIS also hosted a forum for these native title researchers providing an opportunity for them to share information about their research with colleagues from around the country. As part of this project the NTRU has completed a report summarising the outcomes of this survey and forum for circulation to NTRBs. The purpose of this project is to increase communication between researchers and native title practitioners; identify research gaps; and facilitate the provision of timely and relevant research addressing identified needs across the native title system.

1.4 Contribution of NTRU activities to capacity building

The NTRU has carried responsibility for capacity building within the NTRB system. Considered engagement with NTRB practices and policies through collaborative research projects produces knowledge that can be shared across the system. The NTRU continues to receive requests for research with NTRBs and participation in their activities that it is unable to meet within its current research capacity, as well as constant requests for assistance with induction and training. Indeed, based on current requests, AIATSIS would argue that the NTRU's research capacity could usefully be expanded in areas of land management, anthropological and research practice, governance and representation.

NTRB participation in and access to NTRU products, events and services has often depended on the availability of capacity building funding. For example, ATSIC/ATSIS/OIPC have previously provided annual funding of up to \$20,000 to each NTRB to participate in the annual National Native Title Conference convened by AIATSIS. This is the only national forum bringing together key stakeholders

including: native title claimants, NTRB staff, the Federal Court, the National Native Title Tribunal, state and territory governments and industry representatives.

The Conference, which attracts up to 500 delegates, has been recognised by NTRBs as providing an important professional development and networking opportunity for their staff, many of whom are professionally isolated due to the remote location of their employment. There is evidence to support a direct correlation between attendance at the conference and staff retention in NTRBs.

The Conference makes a significant contribution to increasing capacity across the native title system by:

- improving the quality and quantity of information available within the system;
- providing professional and development opportunities for people working in the native title system;
- increasing the understanding of Indigenous peoples contribution to the native title system;
- enhancing collaboration across the native title system; and
- providing opportunities for direct engagement between stakeholders;

The National Native Title Conference has grown each year into a primary event, critical to informing the direction of the native title debates and Indigenous affairs policy generally. The opportunity to profile the co-hosting NTRB and the local native title group also contribute to the uniqueness and importance of the event. The Conference has been described as the most important forum for Indigenous people in the post-ATSIC environment. While this places a great deal of expectation on the conference, it is difficult to dispute the importance of the forum, as was evidenced in 2005 by the National Indigenous Council taking the opportunity to consult with NTRBs at the Conference.

Recommendations:

Recommendation 1: In order to facilitate the efficient use of program funds in supporting the native title system, especially in building the capacity of native title representative bodies, the Native Title Research Unit should be funded to a level that would maintain current functions and undertake additional work on an induction program for NTRB staff, further training and development opportunities through the National Native Title Conference and projects on land management, anthropological and research practice and governance and representation.

Recommendation 2: That funding for the AIATSIS Native Title Research Unit be provided on a three year cycle to allow long term planning, larger scale research projects and secure staff appointments.

Recommendation 3: That NTRBs continue to be funded from the performance enhancement program to participate in the annual National Native Title Conference.

2. The structure and role of native title representative bodies

The role of Native Title Representative Body was created under the Native Title Act to assist native title holders and claimants, through representative and consultative structures, to secure the recognition and protection of their native title rights and interests (NTA s 203BA). The functions prescribed for NTRBs include facilitating and assisting native title claimants to prepare and pursue their application for determination, and to assist them to resolve disputes and to reach agreements. In addition they play a role in helping to identify potential native title holders, for example in response to government notification of proposed action and private proponents of development (NTA s 203B; ss 203BB-BK). Over the past thirteen years of native title activity, the role of NTRBs has developed as perhaps the pivotal institutional structure within the native title regime.

2.1 Need for NTRB system wide analysis

A survey of native title research priorities conducted by AIATSIS earlier this year revealed a need for greater system wide analysis of the NTRB system. A native title system wide report is produced annually by the Aboriginal and Torres Strait Islander Social Justice Commissioner; however, this does not contain sufficient detail and depth of analysis of the NTRB system in particular. Previous analysis of NTRBs such as the Parker, Miller and Love Rashid Reports are now out of date and out of step with the current operational environment and diversity of NTRB operations. Building on targeted projects commissioned by OIPC, the work of the AIATSIS Indigenous Facilitation and Mediation Project and system wide information gathering conducted for the Native Title Resource Guide, AIATSIS has developed a proposal for a system wide analysis of a number of aspects of NTRB operations. This project was originally planned for 2005-2006, but due to limited funding AIATSIS has had to defer this project.

In developing the project AIATSIS identified the need to investigate key areas of NTRB function as well as overall structures, policies and procedures, perceived roles, functions and position, key outcomes and drivers. The result of this examination would be a comprehensive profile of the roles, functions and positioning of NTRBs including the different perspectives, specialisations, and nature of work undertaken in different regions.

In contrast, the short timeframes of the current native title review processes provide limited time for effective policy reform, particularly in the NTRB sector. There is a need for ongoing constructive and collaborative research to evaluate the most effective policy interventions to develop what is now a more diverse sector.

2.2 Structure of native title representative bodies

Previous reviews of NTRBs have recommended a standardised structure for these organisations.³ However, an examination of the governance and management structures of NTRBs highlights the need for these organisations to be structured in a flexible manner that is responsive to the needs and interests of their particular regional constituency. Examples of different governing structures include:

³ ATSIC. 1995. *Review of Native Title Representative Bodies (the Parker Report)*. Aboriginal and Torres Strait Islander Commission, Canberra; ATSIC. 1999. *Review of Native Title Representative Bodies (the Love Rashid Report)*. Aboriginal and Torres Strait Islander Commission, Canberra.

- Yamatji Marlpa Barna Baba Maaja Aboriginal Corporation's Governing Committee, Regional Committees and Working Groups;
- Aboriginal Legal Rights Movement's Native Title Management Committees and statewide representative body called the Congress of South Australian Native Title Management Committees; and
- Native Title Services Victoria, who have an appointed Board and are supporting the developing state wide forum of traditional owners.

Similarly NTRBs have developed claim management and approaches to specifically suit the particular circumstances in which they operate. This has resulted in many NTRBs developing particular areas of expertise or specialisation. Some NTRBs have arguably become litigation specialists, others are recognised leaders in the development of future act agreements, others in mediation or alternative settlement options. This specialisation can have a considerable impact on the staff structure of organisations who must be able respond flexibly to the challenges of recruiting and retaining professional staff in their particular regions.

2.3 Role of native title representative bodies

Many of the organisations that have been recognised as NTRBs existed prior to the *Native Title Act 1993* (NTA), advocating on behalf of and representing their membership in relation to a wide range of issues including: land rights, protecting Indigenous cultural heritage; community development and infrastructure; and promoting economic development.⁴ Many of these activities would be regarded by native title applicants as constituting their native title rights and interests. In this respect native title applicants look to NTRBs to respond to their aspirations for improved social and economic outcomes and such aspirations may not be easily slotted into the NTRBs statutory functions.

In their submission, New South Wales Native Title Services (NSWNTS) described how an assessment of the aspirations of a claimant group may result in the need for an NTRB/NTS to advise applicants not to pursue a native title claim, but rather consider alternative processes such as agreements, lodging a land rights claim or an application to purchase a property through the ILC.⁵ These are often referred to as non-native title outcomes and are an important aspect of the resolution of native title claims. As NSWNTS argues 'achieving non-native title outcomes should be seen as a valuable service provided by NTRBs. They should be seen as valuable outcomes from native title claim processes'.⁶ The need for NTRBs to be able to respond flexibly and creatively to the needs of native title groups is also emphasised by Native Title Services Victoria.⁷ Accordingly, the role of NTRBs in achieving a broad range of outcomes for native title applicants needs to be recognised. NTRBs should be funded to pursue such outcomes fulfil this broader role.

⁴ Compare, Aboriginal Legal Rights Movement (South Australia), which is primarily a legal services agency.

⁵ News South Wales Native Title Services. 2004. *Submission to the Joint Parliamentary Committee on Native Title and Aboriginal Torres Strait Islander Land Fund Inquiry into Native Title Representative Bodies* pp 25-26 http://www.aph.gov.au/senate/committee/ntlf_ctte/rep_bodies/submissions/sub08.pdf

⁶ See note 4 above. p.26.

⁷ Native Title Services Victoria. 2004. *Submission from Native Title Services Victoria to the Parliamentary Joint Committee on Native Title in regard to the capacity of NTRBs to discharge their responsibilities under the Act.* pp 3-4 http://www.aph.gov.au/senate/committee/ntlf_ctte/rep_bodies/submissions/sub05.pdf

The increasing emphasis on agreement making within the native title system, which is supported by governments at all levels, encourages parties to consider native title issues in a broader context. The Aboriginal and Torres Strait Islander Commissioner suggests that native title negotiations occur at different levels;

ranging from consent determinations, agreements ancillary to a determination, to agreements which do not include a native title determination and that the relationship between these three levels of negotiations is clarified by understanding their common underlying purpose – the economic and social development of the traditional owner group.⁸

However the capacity of NTRBs to represent the interests of their constituents in such negotiations has been hindered in the past by the Government's approach to NTRB funding, which has sought to narrowly restrict the role of NTRBs. This restriction, together with the emphasis on 'prioritisation' of claims, masks the under-resourcing of NTRB functions. In targeting the use of limited resources, the representation and protection afforded by the Native Title Act is not enjoyed equally by all native title claimants.

NTRBs provide the interface through which native title claimants engage with native title processes. However, native title requires that claimant groups take on the management of their native title lands and the consequent demands from government and proponents. Given the demands of these processes it is essential that the role of NTRBs in building capacity within Indigenous communities be recognised. Where existing infrastructure does not already exist, NTRBs need to provide community development opportunities, resources and support for the development of Indigenous decision-making, dispute resolution, negotiation, governance and management structures. This investment equips native title applicants with the necessary skills to participate in native title processes and in particular, provides a solid basis for the development of effective independent post-determination corporations.

The capacity of NTRBs to represent native title groups in the broader context of Indigenous affairs is also an issue that requires further consideration, particularly within the context of the new arrangements. As indicated NTRBs do not have the capacity to fulfil a general regional representative role under the existing funding arrangements. Indeed, ATSI/OIPC has enforced service delivery models that have actively discourage the connection to community and advocacy. The extent to which NTRBs are able to participate in inquiries, policy development and reviews that directly affect the context in which they operate is thus restricted.⁹

Regional representative structures must draw their legitimacy from the local communities or interests they represent. Within any region, even in the delivery of services, traditional owners play a primary role in defining the priorities and negotiating outcomes in their traditional country. Native title has increased the say that traditional owners have over government and private sector activities on their country, regardless of a successful native title claim.¹⁰ This legitimacy is not limited

⁸ Aboriginal and Torres Strait Islander Social Justice Commissioner. 2004. *Native Title Report 2003*. Human Rights and Equal Opportunity Commission, Sydney.p.158

⁹ See Goldfields Land & Sea Council's. 2004. *Submission to the Joint Parliamentary Committee on Native Title and Aboriginal Torres Strait Islander Land Fund Inquiry into Native Title Representative Bodies* p.9 at http://www.aph.gov.au/senate/committee/ntlf_ctte/rep_bodies/submissions/sub12.pdf

¹⁰ See, the Yorta Yorta Cooperative Management Agreement with the Victorian government. Fact sheet available at:

to matters of land or natural resource management. Traditional ownership of land, and the assertions of prior and continuing identity and authority implies a role in the governance of the region. In addition, the new arrangements provide opportunities for native title holders and claimants to seek the realisation of their aspiration for land and community development through diverse programs and initiatives. The current disjunction between native title (including ‘alternative settlement options’) and the new whole of government initiatives, including shared responsibility and regional partnership agreements, appears incongruous.

The role of NTRBs in representing the interests of native title claimants needs to be recognised in broad terms in order to ensure the efficient and effective facilitation of Indigenous aspirations in the current coordinated policy environment. Facilitating the exercise and enjoyment of native title rights and interests should extend throughout all stages of the native title process, including post-determination and agreement management structures as well as engaging broader policy and programs areas.

Recommendations:

Recommendation 4: That the role of NTRBs in advancing a broad range of title outcomes in the negotiation and settlement of native title claims be recognised and resourced.

Recommendation 5: That the role of NTRBs in contributing to Indigenous community development to enable native title groups to participate effectively in native title processes (both pre and post determination) be recognised and resourced.

3. Resources available to native title representative bodies.

3.1 Funding native title representative bodies

It has been recognised in numerous reviews and reports relating to aspects of the native title system that the effectiveness of the system as a whole is dependent upon the capacity and effectiveness of native title representative bodies (NTRBs).¹¹ The role of NTRBs in the representation and facilitation of native title claimant applications and other related processes and outcomes is fundamental to the overall functioning of the native title system.

Following the 1998 amendments to the NTA, the functions and responsibilities of NTRBs significantly increased without a corresponding increase in funding. In particular a review of native title representative bodies conducted in 1999 concluded that the workloads of NTRBs were significantly higher than allowed for by the level of funding provided. That Report recommended almost doubling the annual Budget allocation to NTRBs within the native title system, equating to an additional \$40 million.¹² Similarly the Aboriginal and Torres Strait Islander Social Justice

[http://www.dse.vic.gov.au/dse/nrenlwm.nsf/93a98744f6ec41bd4a256c8e00013aa9/9caa04f414e69789ca256e900026da12/\\$FILE/YortaYorta-FactSheet.pdf](http://www.dse.vic.gov.au/dse/nrenlwm.nsf/93a98744f6ec41bd4a256c8e00013aa9/9caa04f414e69789ca256e900026da12/$FILE/YortaYorta-FactSheet.pdf)

¹¹ See HREOC Native Title Report 2004, also Federal Court of Australia (Thurtell) Review 2004.

¹² ATSIIC. 1999. *Review of Native Title Representative Bodies*. (Love Rashid Report) ATSIIC, Canberra.

Commissioner's annual Native Title Report in 2001 highlighted how insufficient funding of NTRBs 'relative to their statutory functions had had the cumulative effect of undermining their capacity to adequately promote and protect Indigenous interests in the native title process'.¹³

The detrimental effects of insufficient funding for NTRBs have also been recognised by state governments and industry representatives.¹⁴ AIATSIS notes that industry, state and territory government submissions to the current Inquiry urge the Federal Government to increase funding to NTRBs in order to increase their capacity to negotiate agreements and process future act applications.¹⁵ The need to fund NTRBs to carry out a broader range of representative functions including promoting 'non-native title outcomes' has also been noted above.

In addition to constraints imposed by limited resources, the current six monthly or annual NTRB funding cycles restrict the ability of NTRBs to provide professional services to their clients. The provision of short term funding also inhibits the ability of NTRBs to provide security of tenure for staff, which has a detrimental effect on staff recruitment and retention, potentially reducing the capacity of NTRBs to provide professional services to their clients. Short term funding cycles makes it extremely difficult for NTRBs to have a long term focus to their work and given the long timeframes involved in the resolution of native title matters this is of great concern.

All NTRBs are required to complete three year Strategic Plans including a general financial plan, a general statement of objectives, a strategy for achieving these objectives and identifying priorities for the performance of its functions. NTRBs would benefit from a funding cycle that reflects this three year planning process, as it would provide a greater degree of certainty and enable longer term planning. The TSRA submission to this Inquiry highlights the value of a longer funding cycle, 'a secure grant of funds which is predictable for the life of the strategic plan...makes planning easier and more efficient'.¹⁶ The submission by NSWNTS notes that being placed on 6 monthly funding applications 'creates more paper work for staff and directs even more of NTRB resources to administration rather than actually performing the statutory functions as required'.¹⁷ The current funding arrangements also inhibit the ability of NTRBs to invest in capital infrastructure, multi-year funding would provide for greater efficiencies in infrastructure spending.

¹³ Aboriginal and Torres Strait Islander Social Justice Commissioner. 2002. *Native Title Report 2001*. Human Rights and Equal Opportunity Commission, Sydney.

¹⁴ See for example submissions from the Queensland, South Australian and Western Australian governments and AIMM, Newmont and the Minerals Council of Australia to the Standing Committee on Industry and Resources, *Inquiry into resource exploration impediments* at: <http://www.aph.gov.au/house/committee/isr/resexp/index.htm>

¹⁵ See for example submissions from the Office of Native Title Western Australia, the Premier of South Australia, the Minerals Council of Australia and the Association of Mining and Exploration Companies at: http://www.aph.gov.au/senate/committee/ntlf_ctte/rep_bodies/submissions/sublist.htm

¹⁶ Torres Strait Regional Authority. 2004. *Submission to the Joint Parliamentary Committee on Native Title and Aboriginal Torres Strait Islander Land Fund* p.5 at http://www.aph.gov.au/senate/committee/ntlf_ctte/rep_bodies/submissions/sub07.pdf

¹⁷ News South Wales Native Title Services. 2004. *Submission to the Joint Parliamentary Committee on Native Title and Aboriginal Torres Strait Islander Land Fund Inquiry into Native Title Representative Bodies* p.19 at http://www.aph.gov.au/senate/committee/ntlf_ctte/rep_bodies/submissions/sub08.pdf

The office of Indigenous Policy coordination has recognised the problems created by short term funding and has moved toward multiyear funding.¹⁸ However, the government has also announced that NTRB recognition is to be reformed to provide for short term recognition of between 1-6 years. For the reasons discussed in relation to the difficulties of short term planning, 12-month recognition (and presumably funding) should be seen as an extreme exception to the general rule, with a 3-year term considered the minimum term in normal circumstances.¹⁹

3.2 Funding for prescribed bodies corporate/registered native title bodies corporate

NTRBs play a crucial role in establishment of prescribed bodies corporate (PBCs) following a determination recognising native title rights and interests. However under the current funding arrangements, NTRBs are only able to assist PBCs up to when the PBC holds its first Annual General Meeting and NTRBs are not provided with specific funds for this purpose. Similarly, there is currently no Federal Government funding provided to PBCs resulting in a situation where native title holders have to rely on state/ territory governments and private companies to provide basic resources and infrastructure in order for them to be able to exercise their native title rights.²⁰ The native title claim process does not necessarily equip native title applicants with the skills necessary to operate a PBC. In the absence of native title holders having existing infrastructure, lack of access to the support, expertise or resources necessary to exercise their native title rights is detrimental to the management of lands and negotiation of post-determination agreements.

In some instances, no doubt, PBCs will wish to operate completely independently of the NTRBs and in such cases PBCs need to be provided with direct funding in order to carry out their post-determination responsibilities. In other circumstances, NTRBs are ideally placed to be able to offer assistance to native title holders who may not have the expertise or capacity to manage and operate a PBC or to simply offer economies of scale in relation to negotiation of agreements or administrative requirements. In either case, however additional resources are required, whether provided to NTRBs or to PBCs, in order to enable NTRBs to carry out these additional support functions.

Recommendations:

Recommendation 6: That NTRB funding be increased to \$80-\$85 million per year as recommended in the Love Rashid Report.

Recommendation 7: That NTRBs be funded on a normal cycle of minimum three year funding agreement linked to the Strategic Plan.

¹⁸ OIPC. 2004. *Submission to the Inquiry into the capacity of native title representative bodies to discharge their duties under the Native Title Act 1993*. Office of Indigenous Policy Coordination, Canberra at http://www.aph.gov.au/senate/committee/ntlf_ctte/rep_bodies/submissions/sub01a.pdf.

¹⁹ OIPC. 2005. "NTRB Reforms" available at http://www.oipc.gov.au/NTRB_Reforms/QA_NTRBarrange.asp

²⁰ See for example submissions from the Northern Territory Government and the Office of Native Title Western Australia, the Premier of South Australia, the Minerals Council of Australia and the Association of Mining and Exploration Companies at: http://www.aph.gov.au/senate/committee/ntlf_ctte/rep_bodies/submissions/sublist.htm

Recommendation 8: That funding should be provided either to NTRBs or directly to PBCs to support native title holders to exercise their native title rights.

4. Impact of inter-relationships with other organisations

The drive for native title outcomes is strong across the system, however different parties have different objectives and understandings of what a desirable native title outcome might be. For example NTRBs seek to maximise native and other outcomes for applicants, the NNTT seeks to reach agreements through mediation processes, State Government have turned to alternative settlements of native title with minimal recognition/impact, while the Federal Court seeks to resolve matters on the Courts list in a timely fashion. As a result of the 1998 amendments to the NTA, all applications for a determination of native title need to be filed with the Court. Under the Court's normal case management practices, such applications are presumed to be ready for hearing when lodged. However, most native title applications were lodged prior to 1998 and were not intended to go to litigation. The Court's case management practices conflict with the original design of the NTA, which encouraged the systematic identification of claims for native title, including the provision of procedural rights to those claims that were registered. The problem of applications not being ready for trial is exacerbated by the need to lodge an application in response to certain future act notices.

While the NTA still provides for applications to be referred by the Court to the NNTT for mediation, the Court has taken an increasingly proactive role in overseeing the progress of applications, through the introduction of a range of measures including: case management conferences, directions hearings, part and early evidence hearings, reducing hearing to only contested issues and Court based mediations. This has blurred the distinction between 'litigated' outcomes' and 'mediated outcomes' in resolving native title claims. Recent examples, such as *Rubibi (No.5)* (2005), and the final settlement of the Miriuwung Gajerrong determination (2005), among others, illustrate the interrelated processes that can now be expected to be common place.

As highlighted in the Aboriginal Legal Rights Movement Native Title Unit's submission to this Inquiry: 'the requirement to commence proceedings in the Federal Court and the Court's participation in the overall management has added another layer of complexity and expense to native title matters'.²¹ The demands of the Court often place NTRBs in a position where they are forced to act in ways that are inconsistent with the priorities set in their Strategic Plans, and for which they are not been able to adequately prepare. This also places them in potential conflict with the funding body, OIPC in relation to agreed activities and performance indicators and the current approach to funding that generally prohibits expenditure on litigation.

NTRBs do not receive funding for litigation; such funding must be specifically applied for and will only be granted for 'strategic claims'. The necessary prioritisation of scarce native title funding and the narrow terms in which NTRBs can pursue

²¹ Aboriginal Legal Rights Movement Native Title Unit. 2004. *Submission by the Aboriginal Legal Rights Movement Native Title Unit to the Parliamentary Joint Committee on Native Title and the Land Fund*. pp6-8 http://www.aph.gov.au/senate/committee/ntlf_ctte/rep_bodies/submissions/sub13_submission.pdf

applications has significant implications, in terms of the control and power that applicants can exert in the claim process.

In addition to this pressure from the Courts and the funding body, NTRBs also have to respond to the priorities of state governments who have implemented a range of strategies to rationalise their participation in mediation and assert control over the claim process, particularly through 'connection requirements'. Such strategies generally maintain that the state will not engage with claimant groups who have overlapping claims and require a detailed connection report to be produced setting out the applicants claim to connection, laws and customs etc to the satisfaction of the State before a consent determination will be discussed. This falsely positions states as the independent arbiter of the veracity of the claim (even more so because the states tend to take a narrow view of the requirements of proof arising from the High Court's decision in *Yorta Yorta* (2002)).

Recommendations:

Recommendation 9: That funding to NTRBs recognise the need for flexibility in responding to the priorities of the government agencies that drive native title processes (State government and Federal Court in particular).

Recommendation 10: That funding to NTRBs take into account the increased intervention of the Federal Court in the progress and management of claims.

NTRU Activities under the OIPC performance enhancement program

1. Research and publications

- Identification of trends and priorities for research and analysis emerging from the recognition and protection of native title;
- Independent assessment of the impact of policy and legal developments;
- Recommendations for policy development and improved practice;
- Longitudinal research and case study research designed to inform policy development;
- Solicited research and analysis from native title practitioners and experts; and
- Publication and dissemination of a range of publications to improve knowledge and understanding of native title.

2. Resources, Networks and Professional Development

- Monitoring of outcomes and developments in native title and collection and dissemination of information;
- Development and maintenance of resources that are accessible and contribute to the understanding of native title and the improvement of native title practice;
- Facilitation of collaboration across the native title system in the development and delivery of AIATSIS native title activities;
- Facilitation of professional networks, particularly in and among NTRBs;
- Conduct of workshops on topical issues for key stakeholders; and
- Facilitation of visiting research fellowships and scholarships.

3. Access to AIATSIS collections

- Facilitation of access to the AIATSIS collections for native title purposes;
- Acquisition of materials and promotion of the deposit of materials into the AIATSIS collections; and
- Providing information and assistance to claimants and NTRBs on the collection and conservation of materials.

4. Native Title Conference

- Holding of a Native Title Conference that brings together key stakeholders, prioritising native title claimants and their representatives, to share information and improve native title research, policy and practice;
- Facilitation of involvement of NTRBs in the planning and priorities for the conference, in particular through the NTRB workshops program; and
- Distribution of papers from the conference.

5. Indigenous Facilitation and Mediation project

- Conduct of the final year of the Indigenous Facilitation and Mediation Project to improve mediation and decision-making practice in the native title context;
- Development of a plan for a network of Indigenous mediators and facilitators to work in native title;
- Development of a training framework of Indigenous facilitation and mediation in the native title context; and
- Piloting of innovative facilitation and decision-making practices within a native title dispute.