



COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

JOINT COMMITTEE ON NATIVE TITLE AND THE ABORIGINAL
AND TORRES STRAIT ISLANDER LAND FUND

Reference: Native Title Representative Bodies

TUESDAY, 29 NOVEMBER 2005

CANBERRA

BY AUTHORITY OF THE PARLIAMENT

INTERNET

The Proof and Official Hansard transcripts of Senate committee hearings, some House of Representatives committee hearings and some joint committee hearings are available on the Internet. Some House of Representatives committees and some joint committees make available only Official Hansard transcripts.

The Internet address is: **<http://www.aph.gov.au/hansard>**

To search the parliamentary database, go to:
<http://parlinfoweb.aph.gov.au>

**JOINT COMMITTEE ON NATIVE TITLE AND THE ABORIGINAL AND TORRES STRAIT
ISLANDER LAND FUND**

Tuesday, 29 November 2005

Members: Senator Scullion (*Chair*), Mr McMullan (*Deputy Chair*), Senators Crossin, Chris Evans, Johnston and Siewert and Mr Melham, Mr Randall, Mr Slipper and Mr Tollner

Senators and members in attendance: Senators Evans, Johnston and Scullion and Mr Melham and Mr McMullan

Terms of reference for the inquiry:

To inquire into and report on:

The capacity of Native Title Representative Bodies to discharge their responsibilities under the Act with particular reference to:

- the structure and role of the Native Title Representative Bodies;
- resources available to native Title Representative Bodies, including funding and staffing; and
- the inter-relationships with other organisations, including the strategic planning and setting priorities, claimant applications pursued outside the Native title Representative Body structure and non-claimant applications.

WITNESSES

**ANDERSON, Mr Iain, First Assistant Secretary, Legal Services and Native Title Division,
Attorney-General's Department 1**

**GRIFFITHS, Mr Paul Gilson, Assistant Secretary, Legal Assistance Branch, Attorney-General's
Department 1**

**MARSHALL, Mr Steven, Assistant Secretary, Native Title Unit, Legal Services and Native Title
Division, Attorney-General's Department 1**

**ROCHE, Mr Greg, Assistant Secretary, Land Rights Services Branch, Office of Indigenous
Policy Coordination 1**

**VAUGHAN, Mr Peter Eric, Group Manager, Lands and Resources, Office of Indigenous Policy
Coordination..... 1**

Committee met at 5.00 pm

ANDERSON, Mr Iain, First Assistant Secretary, Legal Services and Native Title Division, Attorney-General's Department

GRIFFITHS, Mr Paul Gilson, Assistant Secretary, Legal Assistance Branch, Attorney-General's Department

MARSHALL, Mr Steven, Assistant Secretary, Native Title Unit, Legal Services and Native Title Division, Attorney-General's Department

ROCHE, Mr Greg, Assistant Secretary, Land Rights Services Branch, Office of Indigenous Policy Coordination

VAUGHAN, Mr Peter Eric, Group Manager, Lands and Resources, Office of Indigenous Policy Coordination

CHAIR (Senator Scullion)—Welcome. I declare open this public meeting of the parliamentary Joint Statutory Committee on Native Title and the Aboriginal and Torres Strait Islander Land Account. This is the sixth hearing in this committee's inquiry. The committee's terms of reference focus on the capacity of native title representative bodies to discharge their responsibilities under the act, with particular reference to the structure and role of the native title representative bodies; resources available to native title representative bodies, including funding and staffing; and the interrelationships with other organisations, including the strategic planning, setting priorities, claimant applications pursued outside the native title representative body structure and non-claimant applications.

The importance of the role of representative bodies in the overall native title system became very evident during the committee's inquiry into the effectiveness of the National Native Title Tribunal and the select committee inquiry into the administration of Indigenous affairs. Almost all the submissions we have received have concerned themselves with the issues surrounding funding, its delivery, administration and adequacy. These will be carefully considered by the committee in its report. I now invite you to make an opening statement, if you think that is appropriate.

Mr Anderson—Senators, I might start by way of a brief opening statement.

Mr MELHAM—Some of us are not senators; it is a joint committee.

Mr Anderson—Senators and members. I should note at the outset that, as no doubt you are aware, the representative bodies fall within the portfolio of the Minister for Immigration and Multicultural and Indigenous Affairs. The part of the Native Title Act that deals with the rep bodies is administered by the Office of Indigenous Policy Coordination, who are my colleagues at that end of the table. The Attorney-General, however, does have responsibility for the native title system as a whole, and certainly the Attorney and the Attorney's department have an ongoing interest in the effective operation of the representative bodies.

With respect to the department's role, just to make that clear, we provide legal and policy advice to the government on native title, and we advise the Attorney-General on the parts of the act that he administers. My division within the Attorney-General's department includes the Native Title Unit. My colleague Mr Marshall is one of the branch heads of that unit. We deal with things such as advice on the operation of the Native Title Act, the native title implications of government proposals, whole-of-government coordination across the native title system; we deal with the Commonwealth's involvement as a party to native title claims; and we liaise with states and territories generally on the operation of the act. My colleague Mr Griffiths heads up a branch within a separate division of the department which deals with the provision of funding to respondents to native title matters. It is handled quite separately from the claims.

In July last year the department made a submission to this committee which explored the legislative framework for the rep bodies. We also provided some information about funding. Since that submission, the government has announced a package of reforms to the native title system, and one element of that was reforms which will hopefully improve the effectiveness of representative bodies. That was announced by Minister Vanstone last week.

The other five areas of reform are: technical amendments to the Native Title Act—by 'technical', we mean minor or procedural rather than amendments to substantive rights under the act; a review of the respondent funding guidelines, which was also announced last week; an examination of prescribed bodies corporate, to look at their needs and consider their effectiveness; a review of the roles of the Federal Court and the National Native Title Tribunal to consider how they can best work together to most efficiently and effectively resolve native title claims; and generally working to improve the transparency and communication between all parties. One example of what has been done under that particular tranche of the reforms is that the Attorney convened a meeting of native title ministers of all jurisdictions in September this year. That is a package of reforms which is aimed at hopefully increasing the overall effectiveness of the native title system as a system, because we do see it as being interconnected.

Going back to funding, I have here a document that I could provide the committee with which would simply update the committee on the funding position, given that our submission was in July last year and did not include the current financial year's figures. If that would be appreciated, I can provide that.

CHAIR—Thank you, Mr Anderson.

Mr Anderson—I just want to put into perspective the respective roles of the Commonwealth officers here.

CHAIR—Thank you. Are there any questions?

Mr McMULLAN—Does Mr Vaughan want to make an opening remark on behalf of the OIPC?

Mr Vaughan—Thank you. I do not really have anything to add to what Iain has just said; he has provided an overview of the office. As he indicated, we administer the native title rep body provisions of the act. We put in a submission to the committee late last year. To a certain extent,

that has been somewhat overtaken by the minister's announcement last week, which I am happy to talk about.

CHAIR—Is there anyone else who would like to make an opening comment or remark? There being none, we will now move to questions.

Senator JOHNSTON—I have been away, and I would like Mr Anderson to run through briefly the broad thrust of what the minister announced last week. I was on a patrol boat last week and I did not hear any of the announcements. Forgive me for that, but I would like to know what they were.

Mr Anderson—I will defer to Mr Vaughan, given it is his minister.

Mr Vaughan—There was another part of the announcement last week that was unrelated to the rep bodies, so I will not deal with that. There are four proposed changes to the legislation affecting rep bodies that the minister announced last week. The first one is to the effect that, under the act at the moment, to be a recognised rep body you have to be incorporated under the Aboriginal Councils and Associations Act, except in the case of the Northern Territory if you are a statutory land council. That requirement will be changed so that an organisation that is incorporated under the Corporations Act will be eligible for recognition as a rep body. At the moment the native title service providers in New South Wales and Victoria are in fact Corporations Act entities and they cannot be recognised as rep bodies, because of that provision in the act at the moment.

Mr MELHAM—Do you anticipate the immediate throw-up of anywhere else?

Mr Vaughan—It will potentially immediately affect those two. It would depend on whether, at a later stage, an existing rep body wanted to reincorporate under the Corporations Law or a body that applied for recognition in the future were incorporated under the Corporations Law.

Mr MELHAM—So what drove that? Was it the problem in New South Wales and Victoria?

Mr Vaughan—That is the problem we have at the moment, that those two service providers cannot be recognised because they are not incorporated under the councils and associations act.

Senator JOHNSTON—So even if state associations were not incorporated under the Aboriginal Councils and Associations Act, you can have an Aboriginal association that is incorporated under the state system?

Mr Vaughan—And they are not eligible either.

Senator JOHNSTON—No, but they will be now?

Mr MELHAM—If they are incorporated under the Corporations Act.

Mr Vaughan—Yes.

Mr McMULLAN—I want to follow this up. Is that driven by a policy decision or a desire to enhance the option of having more bodies like native title service limited operations, as in Victoria and New South Wales? Is this change simply after the event to enable those two bodies to operate with recognition? Or is it part of a broader endeavour to smooth the way for more bodies like that to operate?

Mr Vaughan—The effect of it would be that it would be possible for more bodies like that to enter the field, yes.

Mr McMULLAN—I understand that, but you are the policy advisory body here and the minister has made this policy announcement. I am trying to find out if the intention behind the announcement is that there should be more of such bodies.

Mr Vaughan—I do not know how practical it is for me to speculate upon the intention behind the decision. I can talk about the effect of the decision, which is as you indicated.

Mr McMULLAN—Nothing the minister has said refers to the possibility of more such bodies? That is my question at the moment. Is that right?

Mr Vaughan—There is nothing in the proposed changes that would prevent more such bodies emerging.

Mr McMULLAN—I am aware of that. Thank you. Sorry to interrupt.

Mr Vaughan—That is all right. I should say, as Mr Roche has reminded me, there actually is, as a result of recent months, a third body: Queensland South Native Title Services.

Mr McMULLAN—Yes, that was drawn to our attention the other week in Brisbane.

Mr Vaughan—Turning to the second change, at the moment the derecognition process for a rep body that is not performing its functions is extremely difficult and cumbersome. It is an extremely difficult provision to administer, largely because of the requirement that not only does the rep body have to be failing to perform its functions but it has to have no capacity, if you like, to get its act together, to reform itself. That is a very difficult criterion to satisfy because it deals with what might happen in the future—admittedly, based on a judgment of the present. It is intended to change the provisions for withdrawal of the recognition so as to remove that requirement, so that the minister is able to deal with the past history and present situation of the body without having to make a judgment about its future capacity, and also to introduce the notion of significant financial irregularity as a criterion for derecognition. That was partly triggered by the experience we had with the Queensland South representative body. It took well over a year from when we first became aware of the extent of the problems in that organisation until such time as it could be derecognised.

There is an associated change proposed, too, which is that the minister must give the organisation 90 days notice that it is considering derecognition for them to respond. That period will be reduced to 60 days. It is considered unnecessarily lengthy, particularly if you are dealing with a malfunctioning organisation in which there are third parties affected.

Mr MELHAM—Where did that change come from? Did that come from you and the experience that you have had, and then you put that up to the minister, or did it come from elsewhere?

Mr Vaughan—You might notice that it was not an issue which we canvassed in our submission of a year ago. It was a product of the Queensland South experience. The third change is that at the moment rep bodies have a franchise for life unless they forfeit it in some way, either voluntarily or by derecognition. It is proposed to change the act so that the recognition of the rep body is for a fixed term of up to six years.

Mr McMULLAN—What happens then? Are you saying there is a rerecognition process like the one we just went through previously, where everybody has to reapply to be the rep body?

Mr Vaughan—No, none of us ever want to have to go through that again.

Mr McMULLAN—That is why I asked. What does happen?

Mr Vaughan—What will happen is that the minister will late next year—assuming the legislation has gone through; it is to come into effect on 1 January 2007—announce a recognition period of up to six years for each individual rep body. So they will all get recognition from that point for varying periods. At the end of their recognition period, whether it is two years or six years, depending on the individual case, the minister will have the option of either rerecognising for a further period or, if he does not rerecognise for a further period, going to the field, so to speak, to look for a—

Mr MELHAM—What is involved in that—purely the discretion of the minister to say whether someone is going to get further recognition? What are the procedural fairness implications of that? I am interested in the process.

Mr Roche—The process is that it is proposed that, as an NTRB reaches the expiration of its recognition period, there is an assessment of its performance, in particular, including its financial performance. They are the two criteria that relate to recognition—basically, financial capacity and performance—and, not in that order, your ability to perform your functions under the Native Title Act. That decision of the minister's would, of course, be subject to the normal constraints, and the advice that she would get would be subject to the usual constraints on the system. But it would ultimately be the minister's decision about whether recognition would be extended for a further six years or more than that period. We would expect that the NTRB would have the opportunity to make its submission both to ourselves as the adviser to the minister and ultimately to the minister herself.

Mr Vaughan—Effectively, it puts a sunset clause on the recognition.

Mr MELHAM—I understand that. What worry me are the ramifications for the rep bodies themselves if they fail to be redone—what it means for a region and the trauma. I can understand not having stuff going on ad infinitum.

Mr Vaughan—One of the spin-offs of having them recognised for differing periods is that we will not have a situation in, say, 2007 or 2009 where the whole country, in a sense, comes to a standstill while everyone worries about their future.

Mr McMULLAN—What happens in a region where the decision is that the rep body is not to be renewed? What then happens? How do we avoid having a hiatus period?

Mr Vaughan—You would expect that the minister would either give the organisation notice that at the end of the period it was not going to be recognised or give it short-term recognition for six or nine months or whatever until a new rep body could be positioned.

Mr McMULLAN—I understand that. I want to speak at length on that in a moment. The latter of those two is pretty unsatisfactory, isn't it?

Mr Vaughan—It would be much better if one knocks off one day and the other takes over the next day. If the decision were not to rerecognise, then the field would be open to a substitute supplier, who could be an existing neighbouring rep body, depending on how the process ends up operating.

CHAIR—What about those circumstances where we have heard there is effectively a turf war about representation at this time. I would have thought that one of those bodies would have felt pretty nervous in that process, because they have articulated in public and before this committee their reluctance to be represented by others, particularly somebody who is representing the interests of someone adjacent to them. What consideration have you put to that process?

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

Senator JOHNSTON—The rep body's representation is not mandatory. You will always be able to lodge your applications and pursue your applications, whether or not you have rep body assistance.

Mr Vaughan—That is correct.

Senator JOHNSTON—They have a franchise but not a monopoly.

Mr Vaughan—Yes. The fourth and final change is that going along with the fixed term or after a limited term recognition would also be a move to multiyear funding of rep bodies to move away from strictly annual funding.

Mr MELHAM—So what are you looking at—triennial or two-yearly funding?

Mr Roche—It would depend on the term of recognition. For example, a six-year one would have two triennial funding terms. If it were less, then logically the multiyear term would decrease.

Mr MELHAM—If it were a four-year, it would be two two-year terms or something.

Mr Roche—The intention is that NTRBs would be funded for their core corporate costs—basically, their staff costs; the cost of keeping their doors open for that triennial period. Then, from year to year, we would review their plans in relation to the work they are doing on particular claims. That would give NTRBs and their staff a measure of certainty and security about continued funding, which we know—

Mr MELHAM—Would you take factors for inflation into account in that funding or not? Would the funding be configured differently from the funding at the moment? Obviously, there have been complaints because there is no growth component in it. Has that been looked at, or is it something that is a matter for the time?

Mr Vaughan—The mechanics of this do not depend on the legislation per se, obviously.

Mr MELHAM—No, I understand that.

Mr Vaughan—One of the advantages of it, which takes a step beyond the inflationary parameter, is that you can say to an organisation, ‘Over the next three or four years’—or whatever the case may be—‘we are prepared to agree to a budget of \$Y million.’ Then, if it has to be front end loaded because of the stage they are at with their claims or response processes, or back-ended in some sort of up hill and down dale sort of way, it will allow us to do that and it will allow them to plan and husband their—

Mr MELHAM—So it is a global—

Mr Vaughan—It is global and will be spread over a number of years, yes.

Senator JOHNSTON—Is that realistic, though? Their track record is pretty ordinary. We are putting out fires on an annual basis. If we start putting them out on a triennial basis, the fires are going to be bigger, aren't they?

Mr Vaughan—As Greg said, you would need to have three- or four-year recognition for a start in order to avail yourself of that. If you are a fire prone organisation, you are probably not going to get more than a year.

Senator JOHNSTON—Okay, I see.

Mr McMULLAN—I want to go back to the more general question about the reforms—not the last point. Obviously, we have to have a look at the detail of how it operates, but I think all the weight of evidence has been in support of a move to multifunding, so that would be welcome. But, on the face of it, it seems to me that the combined effect of the first three changes is to create significant potential—and maybe even the probability of this—for us to see a trend from elected representative bodies to bodies more of a native title services character.

These three things come together: fixed-term recognition, facilitated deregistration and opening up the opportunity of registration of bodies under the Corporations Act—the first of which I think broadly is an appropriate thing to do. It is not that I necessarily object to that, but

putting the three together seems to me to be the most likely outcome. There will be a trend from elected representative bodies to appointed companies. Given that I inherently prefer the concept that people are represented by those they choose rather than by those that are chosen for them, what is the element that is going to prevent what otherwise looks to be a slippery slope?

Mr Vaughan—There are two points, I think. One is directly related to your question and the other is: what is the ultimate objective of the suite of changes? The point in response to your question of this constituting a move from elected organisations to some other sort of organisation is that the Corporations Law organisations that we have in New South Wales and Victoria at the moment are elected. They are not unelected bodies; the directors are not appointed by the minister. I do not think that moving from the councils and associations act to the Corporations Law—

Mr McMULLAN—I do not have any problem with that particular aspect. My guess is that some of the existing bodies will choose to move from one to the other. They may or may not, but I think to have that option is a good thing. It is the combined effect; I do not have any problem with that particular proposal.

Mr Vaughan—The combined intent—if I could talk about intent, it not having been directly addressed in any particular context earlier—is that our assessment, which we made in our submission to the committee, is that the rigidities of the legislation as it applies to rep bodies at the moment creates structural problems. It is very difficult for us to deal with underperformance, poor performance and mismanagement, because of the rigidities of the legislation that exist at the moment. That is why we think you cannot put extra resources and extra money into that system until you have got it more accountable, flexible and responsive.

Mr MELHAM—My concern in relation to dealing with these organisations is that there have been complaints in the past that you have been selective in terms of who you have dealt with and who you have not dealt with, depending on the nature of the organisation. We copped some evidence from Brisbane recently which was solid criticism of how someone was treated by Cape York. I do not know whether there is merit in that or not, but I know that the dogs are barking that people have turned the other way in terms of some of the complaints that you know of. I am not sitting here judging them. What I am interested in is a transparent process that we can all be confident in. If organisations are not performing, then I have a view that they should be shaken from top to bottom. What I want is to try and stop this view that there is a bit of favouritism going on.

Mr Vaughan—I am only able to answer for the past 18 months, since July.

Mr MELHAM—Sure.

Mr Vaughan—That has been a period in which the Queensland South representative body has lost its recognition and a period in which we put a funding controller image in Cape York Land Council and we have put a funding controller into Cape York Land Council. We have also put a funding controller into SWALSC—the South West Aboriginal Land and Sea Council. I cannot answer for the past, and I am not casting aspersions on those before me in any way—

Mr MELHAM— I understand, and the period that I was talking about does predate the past 18 months.

Mr Vaughan—We are obliged to be, and we try to be, even handed and fair in this situation. Of course the politics of each environment is very different.

Mr MELHAM—I understand.

Senator JOHNSTON—With respect to South West, is that a product of their difficult litigious position? The judge sent them back to prove that they had authority for all of their people. That was a huge task. Is that why we put the person in, or was it because you suspected there was mismanagement in there?

Mr Vaughan—I will get Greg to elaborate, but they were facing extreme financial problems partly because they had more staff than they could afford to pay.

Senator JOHNSTON—Okay, so it was a staffing issue.

Mr Vaughan—No, it was not just that.

Senator JOHNSTON—Okay, I can accept that.

Mr Roche—Mr Vaughan has hit the nail on the head. Each NTRB at certain stages has had a very difficult circumstance with regard to litigation, and SWALSC has been no different. The single Nyungar claim has been a particularly difficult piece of litigation for them to manage, but the actual circumstance which gave rise to the decision to appoint a funding controller—and I need to add that at various times we have had funding controllers in five NTRBs; currently we have them in three—was because at that stage they had more staff than they could pay. So, to protect Commonwealth moneys, we appointed a controller, who is still there.

Senator JOHNSTON—I accept that it is a problem, but I am interested in your evaluation. The KPIs for these things are very fluid, if you follow me. We use different criteria from time to time. They were beset upon by a Federal Court judge to go and redo a particularly difficult part of their claim, which ultimately would have been cost-effective if they had succeeded because they would have been able to do a deal, as I read the case; as I understand the way it was running. With regard to the assessment that they were employing more than they could pay, you could say that they needed those people in order to fulfil the obligations that the court was putting upon them and that the budget was not there to meet that requirement. It just depends on which perspective you bring to the table.

Mr Roche—With respect, the process to do that is not to take on more staff. The process is to reapproach us and put in a submission for a variation, which we would consider.

Senator JOHNSTON—I understood they were doing that. Okay, I also accept there are exigencies that these people get themselves into in these things. It is not a permanent situation, though, is it?

Mr Roche—No.

Senator JOHNSTON—You have the controller in there. Once they get on a level playing field again, you will take the controller out.

Mr Roche—Yes, as we have done with the Kimberley Land Council just recently.

Mr Vaughan—We tended to do it as an immediate precautionary measure. Now, if we see that an organisation looks like it has got itself into a financial black hole or some other concerning situation arises, we immediately put in a funding controller while we try to stabilise the situation and find out what is going on.

Mr MELHAM—One of the things that was put to us in Brisbane was the variation in what some of the rep bodies are paying their senior people. Is there any thought being given to bringing down a scale of salaries, similar to what the Remuneration Tribunal does, to give us some consistency across the spectrum? ATSIIC used to have fees determined by the Remuneration Tribunal. I do not know the extent of it, but it was raised with us and I am just wondering whether there is a problem in the variance in how people are paid and whether that is a possible solution.

Mr Vaughan—I will let Mr Roche answer that question. I do not want to diverge into current bills before the Senate.

Mr Roche—We agree that it is an issue. It had come to our attention. In fact, we commissioned a consultant to undertake a survey just to provide us with some baseline data about the salary levels paid across the NTRBs. His sample showed that there was significant variation in salaries and they could not all just be explained by the difference between remote locality NTRBs and city based NTRBs. We actually presented that report to a meeting which we had last week with chief executive officers of the native title rep bodies. At that meeting I think it is fair to say that CEOs noted that this was an issue. However, there was no enthusiasm for moving to a system such as you described, where there would be a range.

CHAIR—Was there any other explanation offered? I actually put the question, and my colleagues did as well. There was some notional answer about why there would be the differential. Apart from the remoteness, was there any other reason? Perhaps they wanted to attract—

Mr Roche—They just seemed to reflect the particular industry, particular NTRBs and particular circumstances.

Mr MELHAM—I am not trying to deny them qualified officers and their ability to bring people in, but I am looking again at a system where you can have an independent assessment of remuneration with remoteness allowances and other factors put in to overcome what could be an abuse. I am not saying it is being abused.

Mr Vaughan—We have finetuned the financial reporting system for the rep bodies as they report to us. In future there is to be much more transparency about how much is spent on anthropological salaries, lawyers' salaries and other different categories, so it will be evident if there are significant variations. The rep bodies were obviously concerned last week that we had in mind to put some sort of common award type framework on them and that that would impact

on their funding. We said that what we are on about is the same as the way the Public Service conducts remuneration surveys between agencies. They do it in the private sector. They should know what their market is and what wages are being paid in their market so that they can know whether they are pitching below or above. It is a bit of a guide for them. At this stage we are not proposing to take it any further forward in terms of enforcement, other than through very close monitoring.

Mr Roche—To which end, we have a requirement in the funding agreement with each NTRB that, when they are proposing to fill the positions of chief executive officer, principal legal officer and chief financial officer, they will consult with us. That includes the terms and conditions.

Mr MELHAM—Yes, the salary package.

Mr Roche—I emphasise that it is only consultation.

Mr MELHAM—I understand. It is better than nothing.

Mr McMULLAN—I want to ask some questions about this core issue of adequacy of funding. Before I do, I wonder if we can get a similar briefing on the changes announced last week to respondent funding. In some ways it is a bit haphazard because it is breaking the sequence of questioning, but it might help to set a bit of a baseline.

Mr Anderson—Certainly. What was announced was a review of the respondent funding guidelines. A consultation draft of the proposed revised guidelines has been released. Consultation runs until, I think, 10 February. Broadly, the intent there is to ensure that the funding to respondents encourages them as much as possible to make agreements and to make agreements that relate to their interest—to participate in relation to their interests rather than to participate in litigation more broadly.

Mr Griffiths—There were probably three core issues that we wanted to bring out in the consultation draft of the guidelines that was published last week. The first one, as Iain mentioned, was to give greater prominence and strength to the refocusing of the respondent funding scheme upon agreement making rather than upon litigation.

Mr MELHAM—How you propose to do that?

Mr Griffiths—There are a number of ways in which we do that. We endeavour to do this at the moment, and the new guidelines will give greater clarity and precision to our ability to do so. For example, the consultation draft guidelines include a couple of clauses, 77 and 78. I will not bother quoting them but, briefly, they say that approval of a grant of financial assistance involves acceptance by the legal service provider that the Attorney-General or his delegate instructs the provider as to the services to be provided. At the moment, that is not in the guidelines. We do include paragraphs to that effect in each of our grants of assistance, but this gives greater prominence to that and enables us to influence the behaviour of our grant recipients in native title matters.

Mr MELHAM—Have you tightened the guidelines for those that get legal aid? It seems to me that a couple of years ago, if I can say this, for political reasons the guidelines were loosened. I always thought that down the track it would eventually lead, hopefully, to some rationalisation of whom you would actually give legal aid to.

Mr Griffiths—There is considerable tightening in that respect as well. Relevant to that, the second thing we want to do is to introduce greater clarity and precision about the interests that are sufficient to attract a grant of financial assistance. In particular, the new draft guidelines provide that it would not ordinarily be reasonable to grant financial assistance if the applicant's interest is of a particular kind. I will not bother going into too much detail but, for example—

Mr MELHAM—So, from your point of view, that would preclude some people who have been granted aid previously.

Mr Griffiths—That is correct. And the third thing is to use the program as we do at the moment but to sharpen our ability to build a capacity within the native title system, such that the program enhances the efficiency and effectiveness of the system, so it looks at the system rather than specifically at respondents. In relation to your comment about loosening of the guidelines, the existing guidelines were promulgated in 1998 and have been in their current form since then. There has been some clarification of how we apply them and interpret them, but this is the first time that there has been a thoroughgoing conceptual rejig of the guidelines.

Mr MELHAM—What has been the cost over that time? Are you able to say?

Mr Griffiths—Do you mean of the program itself or of the revision?

Mr MELHAM—Not the revision but this particular element of legal aid.

Mr Griffiths—I have some figures here on spending, but only since 2001-02.

Mr MELHAM—That is sufficient. For respondents?

Mr Griffiths—For respondents—and I can table this—in 2001-02 spending under our program was \$6 million. In 2002-03 it was \$8,050,000. In 2003-04 it was \$9,890,000. In 2004-05 it was \$6,993,000. In the year to date, as at 28 November, which was yesterday, it has been \$1.992 million.

Mr MELHAM—But you would expect some tightening of that with the new guidelines?

Mr Griffiths—I doubt that we would see the refocusing of the scheme as any sort of a savings measure.

Mr MELHAM—I understand that.

Mr Griffiths—I do not think we anticipate that there will be any decline in funding, in spending. There may be, but that is not part of the framework. What we want is to refocus the appropriation that we have got more clearly upon promoting agreement making.

Mr MELHAM—Negotiation.

Mr Griffiths—Yes.

CHAIR—On that matter, a number of submissions talked about the difficulties with respondents. The respondents could very likely have been also represented by a party representative at that stage—for example, in Queensland, an individual recreational fisherman and Sunfish, or Recfish Australia, who also have party status. As part of that rationalisation, is it reasonable to say that, generally speaking, the capacity for parties to be represented will still be there but in a more efficient way, and that is where the efficiencies will come in?

Mr Griffiths—That is certainly so. The existing guidelines enable us to encourage grouping of respondents. The consultation draft guidelines will give us a greater ability to require grouping. Generally, if there is a grant of assistance—for example, in a particular claim—to a group representative which would be capable of representing the interests of a particular individual who later applies for financial assistance, we would decline to make a grant of assistance to the individual. There may be exceptional circumstances in which it is appropriate, if there is some kind of conflict or something of that kind. But, generally, we would require the person's interest to be represented through the group.

CHAIR—Mr McMullan, did you want to start on the basic funding bit again?

Mr McMULLAN—Yes, I do. I will just range across it, if I might. Sometimes you will have to pick up which one of you is appropriate to answer the question, because I am not sure that I always know. Can I start with prescribed bodies corporate. Clearly one of the continuing themes put forward is that the fact the system makes no provision for the ongoing funding of prescribed bodies corporate (a) is a problem in itself but (b) imposes pressures on the rep bodies. While they do not have any opportunity even to fund them, they come under a lot of pressure to provide assistance, and there are indirect costs to them. Probably they would like to provide assistance, because in some ways there is a continuity of the interest, but they are not in a position to do so statutorily. I am not sure in whose bailiwick this falls, but this question of the prescribed bodies corporate and the appropriateness of their funding was referred to, I know, earlier as something that one or other of the ministers was going to say something about. But I do not think that has yet been covered, has it, in what has been released?

Mr Anderson—I will say something, if I may, in the context of the reforms. Then my colleagues from OIPC may want to carry on. Certainly one of the reforms is looking at the effectiveness of PBCs.

Mr McMULLAN—I saw that, but in the subsequent announcements of last week they were not covered, were they?

Mr Anderson—No, they were covered in the initial announcement. What has been happening there is that we have been engaging in a process of targeted consultation and going out and talking to a number of PBCs and a number of rep bodies, and we will be talking to other parties as well in native title. It is a reflection of the fact that the government does recognise that PBCs are not currently provided for, and there is a question as to what their needs actually are and how

those needs should be met. At the same time, of course, you have got a process, which OIPC might want to say something more about, of actually changing the governance regime in itself.

The C(ATSI) Bill, the Corporations (Aboriginal and Torres Strait Islander) Bill, that is before the Senate at the moment, while it applies broadly to Aboriginal corporations—of which there are more than a thousand, and there are only 39 PBCs—will of course impact on PBCs. It provides, in particular for PBCs, potentially a much simpler regime for governance in that they can opt out of a number of the current provisions that would apply, particularly where they are small bodies.

Through the consultation process we are trying to find out what has been the experience of different PBCs to date in terms of their needs and who can meet those needs, because if you are a PBC in the Torres Strait, for example, it is going to be quite different from being a PBC in an area where there is going to be mining. There will be different sorts of matters raised with you and that you will need to respond to. In some situations it may well be that a much smaller body might be required to assist with formation and things like that. In other areas it might be that what is actually desired by the native title holders is a much bigger body that is going to have a much wider range of operation. They may or may not want to deal with the representative bodies. So these are the sorts of things that are coming up.

There is one other thing about the sources of funding. We are identifying that there are a number of different sources of funding currently available for PBCs. PBCs are not necessarily availing themselves of those sources of funding. One question is why. Is it actually clear to the PBCs that this funding is available and how they access it?

Mr McMULLAN—Tell me what you mean by that.

Mr Anderson—For example, there is the land fund. The ILC has indicated that it would be prepared to provide capacity building to PBCs, but PBCs have not been interested, as far as I am aware, in taking up that offer. That is one of the things that we are exploring. There are also funds run by the state, territory and the Commonwealth governments that can help with land management obligations. If you are a PBC and you have got exclusive rights to land, in addition to your native title rights and obligations you are going to have general rights and obligations with respect to land management. It may be that you can get an income stream coming from state government environmental land management programs.

Mr McMULLAN—That makes sense, but I think you are missing a core point. I do not have any problem with you having a review and looking at it—and you are quite right: some of them are going to be in places where there is going to be active economic activity fairly soon from which they should be able to draw revenue in some way and fund themselves, and some of them are not—but it seems to me that what does not need a review is the need for there to be something to fund the start-up, even if it is only to give them the capacity to apply for those funds to which you just referred. I think all of us going around in this committee, in our individual capacities as citizens or as members of parliament, have had plenty of examples of organisations with a bit of enthusiasm who get the opportunity to talk to not so much the government sources of funds—and I think it is a sensible thing to tell them about at the beginning that those options are available; that is proper—but about the fact they do not have a phone, a table or a photocopier. It is pretty hard to apply if you do not have a computer, a

telephone, a table or a chair. It seems to me it does not require a big review to work out that we need to make some sort of provision for start-up funding, although it is proper to look carefully at ongoing funding—I do agree with that.

Mr Anderson—In respect of the start-up, I note that NTRBs can assist PBCs up until the date of their first annual general meeting, so they are able to assist.

Mr McMULLAN—Yes, but it is not much money.

Mr Vaughan—That is the important point, that NTRBs are able to assist them up to the point of that first annual general meeting. In fact, a lot of PBCs, notwithstanding the fact that native title has been established and recognised, have not been formed or even got to that point. But there is the question of beyond that. Mr McMullan, you are drawing the line to maybe provide some bridging finance at that point pending some other source of assistance coming on. What everyone is wary of is that there are 500 or 600 native title claims in the system, in the pipeline, and we do not want to accidentally trip down a road of starting to fund 500 or 600 organisations until we have actually sorted out exactly what their needs are, what existing options there are to provide assistance to them and what is the remaining gap. As you say, if it is a case of a developer wanting to do something with the land, it is the same as any other land-holder in that sense—the land-holder makes sure their transaction costs are recovered. If it is an environmental issue, then the land management function of the ILC might come into play. If it is a statutory reporting issue, then under the new C(ATSI) Bill, the registrar will be able to adjust the reporting requirements according to the significance of the organisation.

At the end of the day it may be that, if we identify that a gap exists, it is appropriate for rep bodies to step into that gap or it may be that some other source of assistance is better. We are conscious that there has been an issue building up there, as more and more native title is recognised and PBCs are established, but we want to go into this with our eyes open rather than stumble into a situation where we find ourselves having created a precedent that it is difficult to extricate ourselves from.

Mr McMULLAN—I do not want to talk about this for too long, because it is a small point and a little bit off our subject. We should overlap it. Obviously the long-term arrangement needs to be carefully thought through and properly done, but in the enthusiasm to avoid a precedent it is very easy to wind up doing nothing when there is a problem that needs to be fixed now. It is not the first time that a government has had to deal with an issue by saying they want to deal with it in a manner that does not create a precedent but that allows activities to be undertaken. At the moment we all know there are a lot of PBCs with serious problems and something ought to be done about that now and then a long-term arrangement put in place afterwards. There endeth the lesson. Can I just ask some questions now that are actually related to the terms of reference.

CHAIR—Can I finalise that. I just want to ensure, Mr Vaughan, that I have it straight. You think that the way we should approach this should be sufficiently flexible to deal with the very different circumstances, if you like. The end of the NTRB process when the prescribed body corporate takes over is very different. As you would be aware, there are some negotiations where the determination is a consent determination, where the issues associated with how you start off a prescribed body corporate have already been dealt with because the negotiations are consensus negotiations. Invariably, those are the two demographics. I think one does quite well because it is

a consent determination; the other has a wall—okay, rock and roll—and they are looking for a phone. Do you think it is almost process free when you approach it in this way? Are you going to say, basically, at what time are you going to approach this to make the assessment? Are you going to approach it at a stage when you know whether it is a consent or otherwise? Are you going to approach it when the determination is made? Are you able to give us some more comfort about the timing? I think that is absolutely essential for the success or otherwise of ensuring that the prescribed body corporates have the capacity to move forward and the appropriateness of providing assistance. Would you be able to give me an understanding of how you would apply some sort of timing to that process.

Mr Vaughan—I think that is one of the issues that we need to work though in the review process. It may be, as Mr McMullan said, that it would have been better had we started the review six months ago and had it finished now. The review will throw up, as you suggest, the options such as whether the traditional Northern Territory model, where a land council acts for a lands trust, is the only model or whether that is a model that is suitable for the NT but not for a bunch of people down in the south-east who have just got a very valuable piece of real estate that everyone wants to talk to them about.

Senator JOHNSTON—Why not? This is the problem—the trust is a very good item. What I think we are seeing here is that we get individual strong people within the claimant group who are dominating the claim with no accountability to the vast number of people who are in the genealogy. I see the rep body grappling with that, and it is very difficult. If we had an incorporated body up-front as a claimant, who was a trustee, any future act proceeds coming in would have to be distributed pursuant to the powers and objects of the corporation. That would solve a huge problem, to my understanding. We would not have these individuals not being accountable to the lesser lights of the claim.

Mr Vaughan—But that is not the logic in having them incorporated under the councils and associations act, because it does subject the operations of the organisation to a particular statutory regime, the role of the registrar, the capacity to appoint administrators and those sorts of things.

Senator JOHNSTON—But not at the point of application.

Mr Vaughan—That is right, but that is the pre-PBC—

Senator JOHNSTON—Yes, but that is where I want it. I want a prescribed body corporate to be at the front end so that in the future act process, for all to see, the directors have to be accountable if they are directors or the trustees.

Mr Vaughan—Doesn't that assume you have established the native title? You cannot really decide who the traditional owners or the PBC members are until you have established the nature and extent of the native title.

Senator JOHNSTON—They would give evidence on behalf of the prescribed body corporate. You simply bring it forward. Native title would be in those people: the connection and the nexus is a very simple step because they would be the shareholders, trustees or whatever. I do not think it is terribly difficult.

Mr Vaughan—Who would determine who would be members of the PBC at that stage?

Senator JOHNSTON—The court is already doing that now. The court is asking about representation. The court is not going to make a determination for a group of people under a name where some people who are obviously in that group are saying, ‘Hang on, we’re not part of this claim; we are respondents,’ or whatever. The reason they are not part of it is that one group is not accountable to another. If you take out the money element at the front end you get a lot more plain sailing, in my experience.

At the moment, distant relatives of the lead claimants see none of the proceeds—in the future act process particularly. I think that is a huge problem and rep bodies are powerless to do anything about it. I think you really need to have a good, close look at that. There should be some trusteeship so that the proceeds come in, there is a formula where it is divided equally and there is accountability. I think the system would function much more smoothly.

Mr Vaughan—It takes you into a very hotly debated and sensitive area about the extent to which the government—all of us around this table—and the legislative process should regulate these commercial transactions.

Senator JOHNSTON—Absolutely it does, and I think we have been on the back foot. We have a whole lot of people out there who should have been party to these commercial transactions and should have been beneficiaries because they are in the claimant group. Indeed, they have provided evidence in support of the claim and they have seen none of the proceeds. That is the problem.

CHAIR—Senator Johnston, I think this is a great opportunity, and Mr Vaughan has identified that there is a review of that process. No doubt as members of this committee we will have the opportunity to make submissions to that review. I think we should do something radical and return to the terms of reference. I will ask Mr McMullan to go on with his fundamental questions about funding.

Mr McMULLAN—I have a lot of sympathy with what Senator Johnston was just saying. I broadly agree with him; he would be shocked to hear it.

Senator JOHNSTON—I am not shocked to hear it.

Mr McMULLAN—There have been, over the years, a series of inquiries into the adequacy of funding of rep bodies. I do not mean that the inquiries have been by this committee; there have been independently commissioned reports and they seem to have consistently said that when you assess resources against functional requirements the funding is inadequate. That is one of the things that have clearly driven us to look at this question. What is your response to that? Decisions continue to be made about funding that do not reflect the outcomes of those inquiries. Why is that the case?

Mr Vaughan—It sounds a bit trite and to start off with it seems to be stating the obvious but there are always more demands on resources than there are resources available, whether we are talking about rep bodies or any other area of government. The question here is whether the

problem is more acute than it should be or than it would normally be. Rep bodies are charged with making choices and assigning priorities.

Mr McMULLAN—I will come to that question next.

Mr Vaughan—The second point is that some of these reports or endorsements of extra funding come from parties who have a vested interest in the question. I am not just talking about rep bodies; I am talking about state governments and mining companies, who, in other situations, would have to deal with the landowner on a commercial transactions basis of meeting the costs.

Senator JOHNSTON—And pastoralists and local governments.

Mr Vaughan—Yes, so one has to discount some of this sort of endorsement from the MCA or somewhere else in taking that into account. The third thing—and this, I think, comes to the nub of the question from where we sit—is that we are still noticing substantial degrees of misuse of resources and mismanagement of resources. We would find it difficult to justify putting more money into a number of these organisations until we have a statutory framework that allows us to deal with underperformance, mismanagement and corruption in a more timely and effective way than has been possible in the past. So I think, to use an analogy, that once we have a roadworthy vehicle in terms of the rep body framework then we will be in a position to pump more fuel into the tank with confidence.

Mr McMULLAN—I did hear what you said earlier to that effect when you were describing the changes. You said this would create a vehicle that we will be more comfortable with putting more resources into, so I did hear you say that earlier and I did note that. So you are really saying that you think those reports are not right?

Mr Vaughan—I think there is a degree of exaggeration and self-interest in some of them. But I am not saying that the rep bodies are resourced to a level where, even if they were operating perfectly, they would be able to serve all needs, because we are never going to have that environment; there is always going to have to be demand and supply and they are not going to be in equilibrium.

Mr McMULLAN—While you have defined an outcome that is clearly an achievable one, there are a lot of stopping points between where we are and the point that you have defined—and that is the issue. I think that is the issue you need to address. This is principally an issue addressed to you but it does overlap with A-G's particularly as to their respondent funding responsibility—although it is not only that.

One of the related issues with a funding constrained body, and whatever the amount of funding is there is going to be a funding constrained body—I do accept that; obviously we all should be so constrained and should have to be—is that it appears to an outsider looking in that the problem for the rep bodies is that their costs and, at the other end of it, their priorities are significantly influenced and sometimes determined by others. I refer to decisions that Attorney-General's makes about funding respondents, decisions the courts make, decisions that the tribunal makes and decisions that other people make in making claims. That does make the smooth, efficient running of the organisation that any of us here who have run organisations

would aspire to pretty difficult when you get crosscutting questions that impose costs and distort priorities. You start at the beginning of the year saying our priorities are A, B and C but you do not have the capacity to enforce that because you get crosscutting questions. To what extent do you accept that?

Mr Vaughan—I think it is absolutely true that rep bodies are not masters of their own destiny. In a sense they are like one side in a football team or indeed one of the players in a team.

Mr McMULLAN—Sometimes there are more than two teams—that is the problem.

Mr Vaughan—Yes, that is right. And there is an umpire sitting there who can penalise them or change the rules or whatever and it also depends on how their opponents play, not just on how well they play the game. That is a major problem for us, not only as to predictability of financial management and but also in terms of how we talk to them about outcomes based funding or performance based funding. Because they are not masters of their own lives, the achievement or nonachievement of outcomes is not necessarily a reflection on how well they play the game—although it might be if they kick an own-goal. But the environment that we deal with is very much as you describe it.

Mr McMULLAN—How do you set assessment procedures—KPIs or whatever they are—

Senator JOHNSTON—Models.

Mr McMULLAN—Yes—in that sort of environment? What is your current intention with regard to that?

Mr Vaughan—The mechanism we use is that they give us each year what we call an operational plan, which lists the five claims or the expected future acts that they will have to respond to. They assign an expected dollar figure against each of those sorts of tasks.

CHAIR—As there is a Senate division, I suggest you continue to provide the advice as best you can, and we will return as soon as we can.

Mr Vaughan—I was going to take it on notice!

CHAIR—Just carry on.

Mr Vaughan—At the start of the year, they list the range of activities in terms of projects A, B, C and D and claims A, B, C and D. They put a dollar amount against it. In the course of the year, that game plan changes for the sorts of reasons that we all know—the behaviour of the respondents, the behaviour of the court or whatever. They then come to us and say, ‘We’re going to move our money around. We’re not going to spend as much money on that claim or that issue as we thought we would, but we’ve had something else come on stream.’ To some extent there are swings and roundabouts in that which even it out, but in some cases they do get hit during the year with a sort of tsunami not of their own making—it comes out of the blue or it comes on earlier than anyone thought—and we have to have the flexibility to give them additional funding. The quid pro quo of that, of course, means that, if they do not have as much activity on

during the year as they anticipated and they were funded for, we have to have some arrangement and understanding with them that they will carry over that money for a rainy day.

ACTING CHAIR (Mr McMullan)—I agree with the second point. In some of the discussions that have come before us in regard to what you would call in the department of finance ‘application of the urgent and unforeseen costings’, there was an idea that perhaps there needed to be a pool of money to which those people applied. I do not just mean the consolidated revenue fund, which is a pool; I mean that there needed to be something for which they could make an application to you and say, ‘We need some of that because of a future act that has been initiated, a state government change that has done X, Y or Z, a respondent action or whatever.’

Mr Vaughan—We do have a reserve of that kind. In fact, last week at the rep bodies conference we went through some of the procedures for that. I will allow Greg to answer that with a bit more detail about the specifics.

Mr Roche—In terms of the overall situation this year of the rep body system, there is approximately \$59 million to allocate, as the paper that Mr Anderson gave you would show. Of that, currently only \$48 million has been allocated to NTRBs, having looked at their operational plans. We will be reviewing every NTRB again in February, in consultation with them. In addition, there is approximately \$3.3 million that we intend to expend this financial year on capacity-building initiatives with the individual NTRBs and across the system.

But the main spanner in the works is litigation. We have had a number of approaches as they have occurred already in the course of this financial year, and we have topped up individual NTRBs. Last week, we consulted with the NTRBs about some new litigation funding guidelines. At the moment, we currently know that there is potential for claims for litigation. We have one in relation to Newcastle Waters; we have one in relation to the Yulara native title compensation claim; we have one in relation to the possibility of litigation in Gourmdidge Mara; we have one in relation to further funding for the single Anungu claim—that gives you an idea of the sort of reality we deal with. At any time, with any of these things, the NTRB can say, ‘We’ve run out of money,’ or, ‘The judge has brought it on three months earlier than we expected.’ Certainly, under the current funding arrangements, we have the capacity to fund those on a needs basis. We just have to be pretty quick on our feet, as today.

ACTING CHAIR—I understand that. I think this is more a question that falls in the A-G’s area, and it is convenient having you both here. It seems, once again, to an outsider looking in that decisions you make about funding what I will generally call respondents have implications for the costs to other people as well—particularly, for the purposes of our inquiry, the implications for rep bodies. Is that a factor that you do or can take into account when you are looking at an application for funding?

Mr Griffiths—Yes, it is. At the moment under the existing guidelines we would use the reasonableness criterion. It is fairly obvious, I guess, what that means in relation to making a grant of financial assistance. That is also ambulatory through the life of the grant. Once the grant is made we use the reasonableness criterion to determine not only what work was done by a legal representative but why the work was done and why it was reasonable that it was done. That is a dialogue that we have fairly routinely with legal service providers at the moment. The consultation draft of the proposed new guidelines will make that more prominent. It will be quite

obvious that we regard the work that the reasonableness criterion is to do is something that is continuous through the life of the grant. We will use that to liaise quite regularly, as we do at the moment, with the legal service providers who are providing funded services to our grant recipients.

I should mention for the record that the spending figures that I tabled earlier are spread across around 1,250 open grants of financial assistance at the moment. There is a very large number of open grants. A significant part of our expenditure at the moment goes on capacity building largely in the form of salaries for what we call native title officers employed with peak bodies. That would be approximately \$500,000 in the current financial year. The large majority of the remaining expenditure would go on legal costs associated with either the negotiation of ILUAs or matters that are actively in negotiation or mediation. It really would be a comparatively small proportion of the overall expenditure under the respondent program that goes in legal costs for matters actively in litigation. That may not have been the case in the past.

But as I think Mr Anderson will be able to explain, there is a greater maturity in the native title system now over the 10 years and more that it has been in operation, there is a greater understanding on the part of respondents and indeed of other participants of what native title is, and there is a declining fear of native title. I think that is reflected in the fact that the largest part of the respondent funding expenditure does go in matters other than legal costs for matters in litigation.

Mr McMULLAN—In the Attorney-General's Department original outline of the summary of the reforms before last week's announcement it referred to this question of the claims resolution process and that you were going to commence the review a couple of months ago to report to the Attorney-General by the end of this year. What is the situation with that review of the resolution of native title claims?

Mr Anderson—The timing of that review has changed. The consultants were appointed on 17 October.

Mr McMULLAN—Who are they?

Mr Anderson—Graham Hiley QC, who is a Queensland QC with an extensive native title and land rights background, and Dr Ken Levy, who is a former senior public servant in the Queensland government. They have commenced their consultancy and have been carrying out consultations around Australia with rep bodies and a range of other parties. They will continue doing that.

Mr McMULLAN—When do you expect them to report?

Mr Anderson—We are aiming for a report to the Attorney by the end of March. It could be slightly earlier but that is the likely time frame.

CHAIR—I do not know if you have touched on the capacity of rep bodies in my absence. There was some criticism of the capacity of rep bodies to be able to meet the fairly onerous accounting processes that were placed upon them. It has been indicated that there are a number

of staff allocated full time to being able to do that. We all recognise the proprieties necessary, but in the evidence given that was a concern.

We are talking about these rep bodies; perhaps you can give me some clarification about the rep bodies coming under the Corporations Act and the lack of transitional arrangements at the moment. There is a reasonable lack of clarity about what they will be and concern across the board, particularly from rep bodies. I know I am referring to evidence from another committee, but I know you were all there and are aware of it. Because of the lack of transitional arrangements with regard to the Corporations Act, I can understand why people would be fairly nervous about what the need for an increased level of resources to meet those administrative arrangements would mean. I wonder if you could make some general comments on that. Am I off the mark?

Mr Vaughan—It is a relevant question but they will not be required to migrate to the Corporations Act. It will be purely a choice for them as to whether they remain incorporated as is or migrate to the Corporations Act—or, if they are a newly-forming organisation, as to which act they choose to incorporate under. That is a judgment for them to make according to what is in their overall interests—whether it is in terms of the regulatory regime or in terms of the flexibility of one act over the other.

CHAIR—Just in general terms, what percentage of the rep bodies would meet the administrative standards that we are generally applying, as regards their strategic planning and administrative standards generally? How far do we have to go to get them to meet the benchmark?

Mr Vaughan—You start off with the fact that these are not little kitchen organisations. They are \$2 million or \$3 million organisations and they employ lawyers and professionals. They are there to provide a service to native title claimants. They are service providers and they exercise statutory powers. So I do not think we should treat these organisations like the neighbourhood CNA.

CHAIR—I am not suggesting that at all. My question was, very simply: how many do you think actually pass the wire? In your assessment and from dealing these representative bodies, how many do you think pass the wire in terms of administrative scrutiny?

Mr Vaughan—It is a sort of continuum from the highly problematic and really bad to the ones that are really good. It depends where you put the benchmark in that. If you say it is a random distribution it is obviously half-half. But if you apply a more considered benchmark it is a very subjective thing. One objective measure is the fact that at the moment we have three or four of them with funding controllers in. That does not mean that the funding controller is there because of corruption; it can be there for a number of reasons. It does not even mean it is there because they have misused their money, but that is one indicator. The fact that a number of them failed to get rerecognition in 1998 and over the course of a number of years some of them have been involuntarily derecognised is another indicator. But I would be loath to say that seven out of 17 are good and 10 out of 17 are not. It is a complex world.

Senator JOHNSTON—Isn't the problem the distinction between the administration of the land council—because that is what they are; they are land councils—and the council? The

council is made up of Aboriginal people who have limited capability and capacity, by and large. I am talking about Western Australia—that is my experience. Yet the administrators and the CEOs of the land councils are usually fairly capable and astute people. What are we doing about empowering the council? They have got a mass of interesting problems. A conflict of interest is the classic one. The whole structure of a representative body that is effectively accountable to the decision making of land councils—who are claimants themselves—tells me that it is an alarm bell situation. What are we doing about reconciling the administrative powers and processes and building some capacity and some understanding of the role of these councils? What I see in WA is that everyone wants to be on the council because they want to further their own claim. Isn't that the real problem?

Mr Vaughan—This is not an issue that is peculiar to this sector. The problem is that you have a combination of a political advocacy function integrated with a service delivery function. That often gives rise to conflicts or tensions between the two functions, between individual directors, as to whose claim gets priority, or between the administrative arm, as to what is in the interests of the organisation, and directors, as to what is in their interests.

Senator JOHNSTON—Absolutely.

Mr Vaughan—One theoretical option would be to try and disentangle those two functions so that you have a purely service provider organisation separate from the political function. I am not sure how that would work in practice. Who would be the directors of the service provider organisation? Would you deal with the same things?

Senator JOHNSTON—You are absolutely dead right.

Mr Vaughan—What role does the political advocacy organisation play if it cannot play a role in determining priorities?

Senator JOHNSTON—Effectively, the situation we have now—this is why I think considerable reform is needed—is that the land council is made up of the service receivers and beneficiaries of the administration of the land council. That is the craziest system I have ever heard of. It is a recipe for disaster, and that is what we have, effectively. The agendas of the council are not related to the efficiency, cost efficiency or integrity of running a non-conflicted, output related, annual performance type operation. They are simply related to their own claims, of which there are—let us take Yamatji Land and Sea Council, for example—about 17 or something.

Mr Vaughan—It is not unlike being a councillor on a local government council as to whose street gets paved first.

Senator JOHNSTON—But we have a vast number of rules to stop conflicts of interest on councils.

Mr Vaughan—There are a number of checks and balances within the rep body regime in that sense. A good and effective CEO combined with a good and effective chairman is often able to ameliorate those problems. The operational plan, when they put it to us, details in effect how they are going to spend their money between different claimants, respondent processes and

future act processes and so forth. They determine the priorities, but their priorities are constrained by what the other players are doing, what the court is doing and so forth. If we see what we think is 50 per cent of their money going on the chairman's group claim—that seems to us to be a long way down the track, and a snowball's chance in hell—then we would be saying to them, 'Hold on. What are you doing here? Tell us your reasons for this.'

Senator JOHNSTON—I agree with you, but the point about making an assessment is that the chairman's claim might be the best claim. What are we doing about making the determination?

Mr Vaughan—You ask them the question: 'What is your logic for this?'

Senator JOHNSTON—There are a lot of responses to that. You are asking to see anthropology, genealogy, boundary history—you are asking for the claim to be unfolded in front of your eyes so you can verify it.

Mr Vaughan—It is a question to ask in an extreme case—'This seems a pretty unusual and abnormal distribution of your priorities. Have you got a reason for it?'

Mr Roche—In addition, we have a system of liaison officers—native title officers—who usually come out of the rep body system. A number of them are anthropologists by training and have worked in that system, so they usually have a good working knowledge of what is going on in terms of merit of claim, likelihood of successes and internal politics in the NTRB.

Senator JOHNSTON—Who is watching the watchers? You are getting advice—I accept your advice, and I think it is a logical way to go—but there is an awful lot of politics in these things. I do not think there is a claim out there that is cut and dry. There have been some 38, 41, 42 determinations—

Mr Anderson—Seventy-two.

Senator JOHNSTON—That is great. I am obviously behind the times. We have another 600 or so in the wings. I think the point about getting advice is great, but we have to have checks and balances on the advice. I really believe that all the way down the line you must have checks and balances and scrutineer the advice so that you do not go down cul-de-sacs with this stuff.

Mr Vaughan—You need checks and balances, but I do not know whether you can put someone else, ultimately, in the shoes of the rep body and deciding its priorities. The logic is that at the opposite end of the spectrum you have the minister determining which claims individually will get supported.

Senator JOHNSTON—Correct.

Mr Vaughan—That creates just as many potential conflicts of interest on the other side of the fence because governments are respondents to these things.

Senator JOHNSTON—All I am saying is that I think the rep body is right, but you have to redevelop and redefine the thing along the lines of a local government. I think we have to build the capacity in people to understand that when they are on the land council their personal

interests have to go out the window. That is the issue that we have been grappling with for a long time. ATASIC had a program for that that I did not think was terribly well rolled out, but I think that is where we should be focusing.

Mr Vaughan—That is what the legislative changes last week were partly about. It is moving. In the case of local government—to use that analogy, which has some relevance—at the ultimate a minister can appoint an administrator to a local council that has gone off the rails.

Senator JOHNSTON—Yes.

Mr Vaughan—No-one is suggesting that we should go that far with rep bodies, but the ability to derecognise a badly performing rep body—the likelihood of it not getting rerecognised at the end of its term—would be much changed under the legislative changes, which means that there will be sanctions and checks and balances in the new regime that did not exist in the old regime. They would stop short of the local council analogy, but I think they will be a substantial improvement on the range of tools we have available at the moment.

Senator CHRIS EVANS—I apologise for being late—and I am conscious that I might have missed something. I wanted to follow up Mr Griffiths's point about respondents and the funding of their activities. I think you made the point that a large percentage of it was not actually on legal fees, which is a bit counterintuitive for me.

Mr Griffiths—It was not quite that. It was: not largely on legal fees associated with matters actively in litigation. There is a lot of money spent on legal fees associated with, for example, the drafting of ILUAs, attendance, representing clients at mediation meetings and matters of that kind. That was the distinction I tried to make.

Senator CHRIS EVANS—I see. That was going to be my next question: what are we spending the assistance to respondents on? Do you have a breakdown of how that is done?

Mr Griffiths—I do not. That sort of information requires pretty extensive manual manipulation of the data that we can get from our grants management system. It would be possible to do it on a sample basis, but it is quite a difficult process. Part of the reason is that, for example, native title matters start by way of claim—they commence in the Federal Court—but in the subsequent process of mediation, through the NNTT or otherwise, they can bounce back and forth from the tribunal to the court. For one grant, it is very difficult, other than through manual examination, to disaggregate the costs that are spent on the mediation processes as opposed to something else.

Senator CHRIS EVANS—I am not asking you for that fine detail. I am trying to get a sense of where the money is going and what is driving the expenditure, rather than hold you to a definitive 23 per cent on legal fees associated with the claim. I just want a sense of where the money is going overall and what the drivers are.

Mr Griffiths—Earlier, I tabled some figures on spending which I think indicate that the spending through the respondent funding program is not enormous. It is a relatively small proportion of the overall spending on the native title system.

Senator CHRIS EVANS—There are arguments that it has a disproportionate effect on the speed of the process.

Mr Griffiths—There are. But in my view the figures do not bear that out. The spending from 2001-02 through to 2004-05 ranged from—

Senator CHRIS EVANS—I have got that in front of me.

Mr Griffiths—They are not enormous figures. As I said—I think either just before or just after you entered the room—that spending is spread across roughly 1,260 open grants of financial assistance at the moment. That is a very substantial number of grants. That is largely, for example, because any one native title claim will have a multiplicity of respondents with different types of interests, each of whom may well have a grant of financial assistance.

This financial year, approximately half a million dollars of our spending is devoted to what we call ‘capacity building’, which essentially means salary and other related expenses for native title offices engaged by industry peak bodies. As I mentioned, a very large majority of the remainder goes to spending on legal costs, but also other costs, connected with the negotiation of ILUAs and matters that are actively in mediation. It is quite a small proportion that would go on legal costs associated with matters actively in litigation.

By and large, in my experience, most respondents now participate quite constructively in native title matters. There would undoubtedly be exceptions to that, as there would be on the claimant side, but, in my experience, peak bodies in particular almost uniformly want to resolve native title matters by mediation or negotiation. Sometimes there are new legal issues that need to be resolved.

Senator CHRIS EVANS—Have you changed your guidelines at all in recent times?

Mr Griffiths—No. That is, of course, apart from the consultation draft that was launched last week. The guidelines have remained unchanged since they were promulgated in 1998.

Senator CHRIS EVANS—The spending has been between \$6 million and \$9 million pretty consistently. Your figures this year have spending down to just under \$2 million to 28 November. Is the expectation that expenditure will be in the same order of \$7 million or \$8 million?

Mr Griffiths—It is a bit lumpy but, yes, we would expect you could broadly extrapolate from that, though not with precision. I think it is about \$5½ million to \$6 million this financial year.

Senator CHRIS EVANS—Did you explain previously what ‘open grant’ means?

Mr Griffiths—It simply means a grant of financial assistance that has been made and which has not been exhausted, closed or decommitted—in other words, there is still a grant of financial assistance, with funds available, for the purposes of the grant.

Senator CHRIS EVANS—But you do not fix an amount? You say you will fund them and then the amount is determined by requests to fund particular actions?

Mr Griffiths—When we approve a grant of financial assistance, we make what we call a ‘commitment decision’. In other words, we put an amount which is effectively the upper limit of the liability that the Commonwealth assumes in relation to that particular grant. That is called the commitment amount.

Senator CHRIS EVANS—That is at the start?

Mr Griffiths—It is. In the earlier years of the program, many of those commitment decisions were very large and very general, largely because of unfamiliarity with the way the native title system would develop and evolve. For the past few years, we have made commitment decisions for a relatively small amount of time and for discrete stages of a matter, customarily fixed by reference to, say, 12 months or six months time. We commit an amount for the purposes of the grant for maybe six months or 12 months. The actual expenditure will depend upon our assessment of the claims that are made to us by the peak body or the legal service provider, and our primary criterion is reasonableness, which I mentioned earlier.

Senator CHRIS EVANS—Do they make claims retrospectively or prospectively?

Mr Griffiths—Prospectively.

Senator JOHNSTON—I think you have supported the Pastoralists and Graziers Association of Western Australia with some grants. I take it that that is the sort of peak body you are talking about. They represent a number of pastoralists who are involved in a claim and they are seeking to do an agreement or whatever.

Mr Griffiths—That is correct.

CHAIR—I thank witnesses who have provided evidence today. I remind witnesses that there may be some questions on notice.

Committee adjourned at 6.35 pm