

GOVERNMENT RESPONSE TO THE REPORT BY THE PARLIAMENTARY JOINT COMMITTEE ON NATIVE TITLE AND THE ABORIGINAL AND TORRES STRAIT ISLANDER LAND ACCOUNT ON THE OPERATION OF NATIVE TITLE REPRESENTATIVE BODIES (MARCH 2006).

Recommendation 1

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

Response

Accepted, with publication options to be considered at a later date. The Government acknowledges the importance of assessing the relative effectiveness of NTRBs in meeting their statutory obligations and is working on developing and improving a range of comparative assessment data. There are, however, significant complexities associated with establishing key performance indicators on which to base relevant data. NTRBs' operating environments differ widely, for example, with respect to: the extent to which native title may have been extinguished or connection maintained in the NTRB's area; levels of future act activity within the NTRB's area; the degree of intra-indigenous disputation within the NTRB's area; and the policies of State and Territory governments towards resolving native title matters. Comparative assessments based solely on uniform key performance indicators - such as claims or future act matters finalised - would therefore be of limited assistance in determining an NTRB's relative effectiveness.

As part of the existing funding and reporting framework, OIPC has therefore concentrated on developing mechanisms for comparing NTRBs' success in completing activities nominated in their operational plans. To make these comparisons more meaningful, OIPC will encourage NTRBs to adopt more uniform activity descriptors where appropriate, while remaining sensitive to the need for NTRBs to plan their workloads in response to local circumstances. This process will be assisted by performance enhancement activities which target common NTRB needs and will lead to more uniform ways of working. These activities are discussed in more detail in the response to Recommendation 8. The Government will also consider other ways in which more objective comparisons between NTRBs might be facilitated.

Given the complexities outlined above, the Government would be hesitant to publish annual comparative data on the relative effectiveness of NTRBs at this stage. It will however give further consideration to this possibility as funding and reporting frameworks are refined.

Recommendation 2

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

Response

Not accepted. The Minister is not presently required to consider independent advice in making decisions about NTRB recognition. Under the proposed reforms, the Minister would make decisions about recognition more frequently than at present but would not be required to consider additional criteria in doing so. The introduction of re-recognition requirements would not affect the substance of the advice on the relevant criteria provided to the Minister by OIPC. As at present, the Minister will be required to consider whether an NTRB has satisfactorily performed and would be capable of satisfactorily performing NTRB functions. OIPC holds substantial amounts of information relevant to these criteria and its staff have practical experience in gauging whether they have been met.

NTRBs would be able to make submissions to the Minister on re-recognition decisions. Further, as is presently the case for recognition decisions, NTRBs could seek review of a decision under the Administrative Decisions (Judicial Review) Act 1977. The proposed reforms will therefore retain existing procedural safeguards for NTRBs. At the same time, the re-recognition process will bring more accountability to the native title system as a whole compared with current indefinite recognition arrangements.

The current reforms are also designed to improve efficiency in the native title system and the Committee's recommendation is not compatible with this objective.

Recommendation 3

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

Response

Accepted. When the Bill is introduced, updated and more detailed information will be posted on the OIPC website (www.oipc.gov.au). It is planned that all existing NTRBs will be re-recognised on 1 July 2007. Therefore the earliest these transitional arrangements would be needed is 2008 (and it may actually be some years after that) and there would be ample time to inform claimants about the new system. In relation to re-recognition processes after the initial transition period, it is envisaged that where an NTRB's recognition is not to be renewed, a replacement will have been identified and transfer arrangements made well ahead of recognition expiring, so there should be no uncertainty for claimants.

Recommendation 4

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

Response

Accepted. The Native Title Act 1993 (Native Title Act) already provides for written agreements about representation between NTRBs where a claim overlaps NTRB boundaries. To date, this has not been a problem area, with representation usually being readily agreed on the basis of where the largest geographic part of the claim falls, or where the greatest number of claimants live. Nevertheless, OIPC will pay particular attention to such cases to determine whether there are issues adversely affecting claimants. Should there be instances where NTRBs fail to come to a suitable arrangement, OIPC will act as a broker in discussions to resolve the impasse. This could include, for example, agreeing to vary existing funding agreements so that funding for a matter is re-allocated between NTRBs, or assisting NTRBs to explore whether a variation to NTRB boundaries is warranted.

Recommendation 5

The Committee recommends that the Commonwealth immediately review the adequacy of the level of funding provided by the OIPC to NTRBs for capacity building activities including management and staff development, and information technology.

Response

Accepted in part. There is significant capacity building activity being undertaken within current funding levels. Activities include training in administrative law and corporate governance, and human resources development and support. OIPC has to date been able to meet all requests for these services from within existing funding. There is therefore no requirement for an immediate funding review. On completion, the current projects will be evaluated, and at that stage, OIPC will review the adequacy of funding.

Recommendation 6

The Committee recommends that the Commonwealth, in conjunction with industry groups, consider providing additional pooled funding for emergency and unforeseen situations, such as future act matters, litigation or court proceedings; and that the OIPC develop guidelines and procedures that will enable funding to be available in these situations in a timely fashion.

Response

Accepted in part. OIPC already provides funding for major litigation under its Contested Native Title Litigation Scheme. In 2005-06, save for one application which is under consideration, all applications for funding under this Scheme were approved (although some applicants received less than the amount originally requested). Guidelines for funding under the Scheme came into effect on 1 January 2006. The

Guidelines make it clear that OIPC will process applications for funding within 10 working days of receiving all relevant information from NTRBs.

NTRBs are also free to apply at any time for additional funding for unforeseen activities which can be made available in a short space of time. OIPC does its utmost to process applications for such funding as quickly as possible. However, processing time-frames may be affected where the relevant NTRB does not provide all relevant information to OIPC at the time of making the application.

The Government notes that future act proponents and some State and Territory governments contribute funding for future act matters, including by funding NTRB future act officers in some instances. The Government is not aware of any evidence to support the need for additional pooled funding for future acts and is not aware of any evidence of emergencies arising. The Department of Industry, Tourism and Resources has consulted with the Minerals Councils of Australia regarding this aspect of the recommendation.

Recommendation 7

The Committee recommends that the Commonwealth ensures that the level of funding available to the Office of the Registrar of Aboriginal Corporations provides NTRBs with adequate training and support to meet the requirements of the introduction of the new corporate governance regime under the Corporations (Aboriginal and Torres Strait Islander) Bill 2005.

Response

Accepted. The Office of the Registrar of Aboriginal Corporations (ORAC), FACSIA received additional funds in the 2006-07 Budget to implement enhanced capacity building for Indigenous corporations including accredited and non-accredited training in corporate governance. In addition ORAC already has a training and information program in place to assist participants understand the new Corporations (Aboriginal and Torres Strait Islander) Bill 2005. There will be time for corporations to transition into the new legislative framework in the lead up to its commencement and also after its commencement and ORAC is working with funding bodies to maximise opportunities for corporations to understand the new requirements.

Recommendation 8

The Committee recommends that the Commonwealth immediately review the level of operational funding provided to NTRBs to ensure that they are adequately resourced and reasonably able to meet their performance standards and fulfil their statutory functions.

Response

Not accepted at this stage. Approximately half of the total funding allocated to the native title system annually is directed to NTRBs. Funding for individual NTRBs is reviewed annually and allocated in light of the operational plans they submit. The Australian Government considers that any deficiencies in performance result

primarily from a lack of NTRB capacity, rather than a lack of funding. NTRB capacity is being specifically addressed through the Performance Enhancement Program (PEP) and by the current legislative reform proposals, which aim to achieve greater levels of NTRB accountability, responsiveness and efficiency.

In the 2005-06 Budget the Government agreed to extend additional funding provided to the native title system in 2001-02, committing an additional \$72.9 million to the native title system over the four years to 2008-09.

Of the additional funding provided in 2005-06, \$15.6 million was allocated for NTRB capacity building and strategic litigation initiatives. Expenditure under the PEP for 2005-06 was approximately \$2.9 million. Spending in 2006-07 is likely to increase to \$4.8 million with the full year effect of key initiatives implemented in 2005-06.

In 2005-06, the PEP provided for implementation of a new Common Services Project (CSP). The CSP will focus on delivering a range of human resource development and support services for NTRBs. This is consistent with recommendations made in a recent report commissioned by OIPC which considered NTRB needs in relation to recruiting and retaining legal staff. The CSP builds on the report's recommendations by encompassing NTRB needs in relation to anthropologists and other staff where feasible, and seeks to address training and development needs of all NTRB staff.

Monash University, through the Castan Centre for Human Rights Law (Castan Centre), has been engaged to deliver services under the project. The Castan Centre's mandate includes promoting human rights through teaching, publications and public education.

The Castan Centre will engage a Strategic Development Manager to advise NTRBs on human services issues. Other services to be delivered under the project include: a student placement program; promotional activities regarding opportunities in NTRBs; a locum program; encouraging development of a mentoring service; preparing an induction manual and providing associated training for professional officers; conducting training needs assessments for NTRB staff and providing training in key needs areas; and developing and implementing an NTRB staff performance evaluation and learning needs assessment tool.

The CSP will also explore levels of interest amongst NTRBs in common services arrangements for professional indemnity and other insurance cover. Experience in these trial areas will provide guidance on the potential for other common services arrangements to be implemented for NTRBs.

In addition to the CSP, the PEP provides for a range of initiatives designed to improve NTRB capacity and performance, including:

- communication forums and workshops for NTRB management and key staff groups;
- additional dedicated funding for NTRB staff development, training and support;
- specialist training workshops on governance, administrative law and contract management for NTRB staff and governing committees;

- support for improvements in NTRB IT infrastructure;
- services commissioned through the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) Native Title Research Unit, including: the annual national native title conference; web based services and native title focused research and publications; maintenance of resource and professional development networks; access by NTRBs to AIATSIS collections; and development of training and resource materials on conflict management in native title;
- research and investigations into significant issues affecting NTRB efficiency and effectiveness;
- web resource development; and
- change management and assistance with compliance obligations.

These activities aim to improve NTRBs' capacity to perform their functions cost-effectively, and hence improve outcomes for Indigenous people from the native title system.

Funding for the native title system will be reviewed in the budget context at the end of the current funding cycle.

Recommendation 9

The Committee recommends that the OIPC, in close consultation with NTRBs, develop standardised criteria for use in the recruitment of representative body staff; and that these criteria be used nationally to provide consistency in standards of recruitment.

Response

Accepted. While OIPC seeks to avoid being overly prescriptive about NTRBs' day-to-day operations, some consistency in this area is desirable in the interests of attracting and retaining quality staff across the system. The new CSP (see response to Recommendation 8) will assist NTRBs with advice on human resources development and practice generally, including by providing advice on key issues such as recruitment.

Recommendation 10

The Committee recommends that the Commonwealth investigate the feasibility of:

- the secondment of expert government staff to NTRBs;
- the establishment of a centre of excellence to develop the legal capacity of NTRB lawyers and from which NTRBs could draw expertise as required; and
- the provision of scholarships for post-graduate study to further enhance skills in areas of relevance to the work of NTRBs.

Response

Accepted.

- the Government acknowledges the benefits of staff exchanges and has recently arranged initial secondments to and from NTRBs. Further secondments may be arranged as opportunities arise.
- the Castan Centre will be promoting career opportunities in NTRBs to public sector personnel, and opportunities for seconding lawyers and public sector personnel to NTRBs;
- under the CSP, the Castan Centre will also be providing many of the services which the recommendation envisages being provided by a Centre of Excellence. There will be targeted courses provided to lawyers on aspects of native title law and practice, the development and promotion of a mentoring framework for NTRB professional staff, a register of Counsel and other professionals with experience in native title matters, and a source of professional advice for NTRBs on human resource issues; and
- there is already a postgraduate scholarship program for lawyers in the native title system or for interested new graduates. NTRBs may also support such activities using dedicated additional funding provided for staff training, development and support.

Recommendation 11

The Committee recommends that the Commonwealth implement a national recruitment strategy to address the professional staffing needs of NTRBs and that this strategy:

- promote the status and positive image of work in NTRBs;
- focus on promotion of careers in NTRBs to the professions;
- introduce an ongoing NTRB student placement program; and
- promote the employment of Indigenous people to positions in NTRBs.

Response

Accepted.

- under the CSP, the Castan Centre has been engaged to promote careers in NTRBs;
- these promotions will target major law firms and relevant university faculties. Secondments will be coordinated, and a register of experienced Counsel developed and maintained;
- the Castan Centre currently coordinates the placement of law students in NTRBs, and it is planned that this be extended to anthropology students; and
- there are already a significant number of indigenous employees in NTRBs, and more will be attracted as career prospects improve through enhanced human resource practices.

Recommendation 12

The Committee recommends that representative bodies focus on the professional development needs of NTRB professionals and enhance the support structures and programs available to them, including:

- developing a formal induction training program for new recruits;
- establishing ongoing training programs to further enhance skills in particular areas;
- creating a mentoring system; and
- implementing performance evaluation systems to assist in the identification of professional development needs.

Response

Accepted. Under the CSP, the Castan Centre has been engaged to:

- develop an induction program, including providing training and an induction manual;
- deliver and coordinate general and targeted training programs in areas of need identified by NTRBs, including for senior management;
- develop, establish and maintain a mentoring framework for professional staff and an alumni network of former staff to support the mentoring process; and
- develop, implement and support a model NTRB performance evaluation and learning needs assessment tool for professional staff.

Recommendation 13

The Committee recommends that the OIPC continue to monitor the salary differentials provided to senior professional staff of NTRBs; and introduce a scale of salaries to provide consistency across the system if significant differentials continue to apply.

Response

Accepted in part. It is agreed that consistent salary scales are desirable, and OIPC will continue to monitor the differentials revealed in the survey which it commissioned, and which it has provided to NTRBs for their guidance. OIPC has provided a model remuneration framework to NTRBs for use as a guide in the recruitment process with the objective of achieving greater consistency across NTRBs over time. However, NTRBs have not supported a compulsory salary framework, and OIPC, while encouraging consistency, does not consider it appropriate to enforce one against NTRBs' wishes.

Recommendation 14

The Committee recommends that representative bodies investigate the feasibility of implementing a system of 'pooling' of professional staff in situations where an NTRB may lack a full complement of particular professional staff.

Response

Accepted. Under the CSP, the Castan Centre has been engaged to develop and implement a locum service to place short term appointments in critical NTRB need areas pending recruitment. NTRBs already collaborate extensively and share resources and expertise where possible, and this will be further encouraged. The

Government acknowledges that this recommendation could create considerable efficiencies and will consider how it might be more fully implemented.

Recommendation 15

The Committee recommends that the OIPC continue to support NTRBs in improving the quality of their strategic planning processes and especially in integrating strategic plans, operational plans and performance based budgeting and reporting.

Response

Accepted. OIPC is committed to working closely with NTRBs to improve native title outcomes, including through integration of planning, budgeting and reporting processes. However, consistent with Recommendation 16, the proposed reforms will remove requirements for NTRBs to prepare strategic plans and table annual reports in Parliament (see further below).

Recommendation 16

The Committee recommends that the OIPC, in consultation with representative bodies, review the current compliance and accountability requirements placed on NTRBs with a view to reducing unnecessary duplication of reporting and streamlining reporting procedures.

Response

Accepted in part.

As noted above, the proposed reforms will remove requirements for NTRBs to prepare strategic plans and table annual reports in Parliament. Given their generality, strategic plans have proved to be of limited use as planning tools. They have therefore created unnecessary work both for NTRBs and OIPC. Requiring NTRBs to table their annual reports in Parliament has also proved to be unnecessarily onerous. These measures will substantially streamline planning and reporting procedures.

NTRBs' reporting requirements under the PFA are consistent with Australian Government requirements for all Indigenous program funding. However, OIPC continually attempts to identify ways to reduce unnecessary reporting requirements and red-tape for NTRBs. For example:

- The PFA is periodically reviewed and re-drafted to improve clarity and remove unnecessary requirements. NTRB Chief Executive Officers, Chief Financial Officers and senior professional officers have been consulted in this regard and their views taken into account. PFAs were recently amended to allow NTRBs to engage consultants who are members of a relevant professional association without going to tender, and to raise the value of work that can be procured without tendering. PFAs were also amended to remove the automatic requirement that OIPC obtain an independent assessment before

agreeing to fund contested litigation which had caused unnecessary delays in processing funding applications.

- OIPC recently issued Guidelines for Contested Native Title Litigation Funding which clearly state the criteria that NTRBs must address in applying for such funding.
- As noted in the response to Recommendation 1, for 2005-06, financial reports were required every three months and operational reports were required every six months. For 2006-07, financial and operational reports will be required every four months. The revised reporting frequency was broadly supported by NTRBs' Chief Financial Officers and will ensure that reporting is more outcomes-focused and thus more useful. The new requirements should also be simpler to comply with.

OIPC will continue to streamline compliance processes wherever possible. However, this imperative must be balanced against the need to ensure that public monies are adequately accounted for and appropriately targeted towards progressing native title matters for which NTRBs are funded.

Recommendation 17

The Committee recommends that the amended Guidelines on the Provision of Financial Assistance by the Attorney-General under the Native Title Act 1993 due to come into effect in June 2006 provide:

- provisions to encourage agreement-making rather than litigation to resolve native title disputes; and
- that eligibility for assistance be subject to means testing along similar lines to those applying for grants of legal aid.

Response

Provisions to encourage agreement making

Accepted. The Australian Government announced a package of complementary reforms to the native title system in 2005, including a review of the Respondents' Funding Scheme Guidelines. One of the Government's objectives is to promote the resolution of native title matters through agreement making, rather than litigation, wherever appropriate. The consultation draft Guidelines incorporate features that will further encourage agreement making, including the following measures:

- authorising assistance in stages of 6 to 12 months, or shorter timeframes, to facilitate improved and more transparent planning by funded parties focused on achieving outcomes;
- varying or terminating assistance if a grant recipient fails to act reasonably by not endeavouring to reach a reasonable agreement with a claimant;
- limiting financial assistance in court proceedings to situations where the matter raises a new and significant question of law, or the court requires the respondent's participation in proceedings, or the claim will affect the respondent in a real and significant way and the claimant unreasonably fails to negotiate.

- strengthening reporting requirements imposed on grant recipients to include strategies to resolve issues in dispute.

The proposed draft Guidelines were released for consultation in November 2005. Responses are being assessed. Subject to approval, it is proposed the revised Guidelines will be implemented by 1 January 2007.

Eligibility for assistance to be subject to means testing

Not accepted. At present an applicant's financial circumstances are assessed when determining the reasonableness of making a grant of financial assistance.

Under the consultation draft guidelines, evaluation of financial circumstances would continue to apply where an individual applies for assistance and is not represented by a peak body. As a condition of a grant of financial assistance an applicant may also be required to make a contribution to the total matter costs.

Where the applicant is not a natural person consideration will be given to what other financial resources are available to the applicant from owners, members and beneficiaries. A publicly listed company would be regarded as having sufficient financial resources not to receive assistance.

Recommendation 18

The Committee recommends that the Commonwealth examine appropriate means for resourcing the core responsibilities of Prescribed Bodies Corporate.

Response

Accepted. As the Committee notes, the native title system reforms include an examination of the current structures and processes of Prescribed Bodies Corporate (PBCs). This task is overseen by a Steering Committee comprised of officers from the Attorney-General's Department, OIPC and ORAC. The Steering Committee has undertaken targeted consultations with a range of stakeholders including NTRBs, PBCs, State and Territory Governments and industry bodies.

The Steering Committee has considered appropriate means for resourcing of PBCs' core responsibilities in the context of the examination, including consideration of existing funding sources and resourcing needs beyond funding (eg, capacity building and professional assistance). Consideration has also been given to whether existing structures and processes could be made more manageable and less resource intensive.

NTRBs are a key existing source of assistance for PBCs in meeting their core responsibilities. The Committee's Report suggests that NTRBs must cease being involved with PBCs when PBCs hold their first annual general meeting. In fact, under their funding agreements with OIPC, NTRBs can perform their statutory functions in relation to PBCs at any time. These functions are significant and include assisting PBCs to negotiate ILUAs and other future act agreements. It is however currently the case that NTRBs cannot use their Australian Government funding to

contribute to a PBC's day-to-day administrative costs beyond the PBC's first annual general meeting.

Recommendation 19

The Committee recommends that the Commonwealth, State and Territory Governments widely publicise the availability to Prescribed Bodies Corporate of different funding sources, particularly in relation to the PBCs' land management functions.

Response

Accepted. As noted above, the current examination of PBCs includes consideration of existing resources available to PBCs, including in relation to their land management functions. The Government agrees that there would be merit in working with State and Territory governments to publicise the availability of any such resources to PBCs.