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

**Reference: Native Title Representative Bodies**

WEDNESDAY, 12 MAY 2004

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**JOINT COMMITTEE ON NATIVE TITLE AND THE ABORIGINAL AND TORRES STRAIT**

**ISLANDER LAND FUND**

**Wednesday, 12 May 2004**

**Members:** Senator Johnston (*Chair*), Senator McLucas (*Deputy Chair*), Senators Crossin, Lees and Scullion and Mrs Hull, Ms Ley, Mr McMullan, Mr Secker and Mr Snowdon

**Senators and members in attendance:** Senators Crossin, Johnston and McLucas and Mr Snowdon

**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:

1. the structure and role of the Native Title Representative Bodies;
2. resources available to Native Title Representative Bodies, including funding and staffing; and
3. 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**

**SHERWIN, Mr Alistair, Branch Manager, Native Title and Land Rights, Aboriginal and Torres Strait Islander Services..... 1**

**STACEY, Mr Brian, Group Manager, Aboriginal and Torres Strait Islander Services ..... 1**



**Committee met at 8.09 p.m.****SHERWIN, Mr Alistair, Branch Manager, Native Title and Land Rights, Aboriginal and Torres Strait Islander Services****STACEY, Mr Brian, Group Manager, Aboriginal and Torres Strait Islander Services**

**CHAIR**—I declare open this public meeting of the parliamentary Joint Statutory Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund. Tonight is the first hearing of the committee's inquiry into the native title representative bodies. The committee plans to hold further hearings and discussions around Australia over the next few months. This inquiry focuses on the capacity of native title representative bodies to discharge their responsibilities under the act, with particular reference to (1) their structure and role, (2) the resources available to them, including funding and staffing, and (3) their interrelationships with other organisations.

I welcome the witnesses. The committee prefers all evidence to be given in public, but should you wish at any time to give your evidence, part of your evidence or answers to any specific questions in camera, please feel free to make application to do so and the committee will give consideration to your application. I would advise you, however, that evidence taken in camera may subsequently be made public by order of the Senate. Should you need to take any questions on notice, I would ask that your answer to such questions be provided within 30 days, in accordance with the practice adopted during Senate estimates. Finally, as you are government officers, I point out that you will not be expected to answer questions which invite you to express a personal opinion on matters of policy and that you will be given reasonable opportunity to refer questions to superior officers or to the minister, should you wish to do so. Do you have an opening statement, Mr Stacey?

**Mr Stacey**—We do. As the manager of the ATSI Land and Development Group, amongst other duties—including responsibility for the Business Development Program—I have overall carriage of ATSI responsibilities in respect of native title and native title representative bodies in particular. I think most of the members of the committee know me from my having been previously the manager of the Native Title and Land Rights Branch in ATSI and, before that, ATSI. In fact, from 1996 I have had direct responsibility for ATSI's native title programs—so that is over seven years. That position, by the way, is now held by my colleague Alistair Sherwin. So I have been closely involved with the legislative and administrative aspects of the representative body system for a number of years, and I continue to have overall responsibilities in that respect.

The CEO of ATSI, Wayne Gibbons, asked that I represent ATSI at tonight's hearing. We welcome the inquiry by the committee and we look forward to a constructive dialogue with the committee over the course of this inquiry. It is opportune from our point of view—from an ATSI perspective—to take a good look at the representative body regime in terms of the role of representative bodies; their capacities and the resources that are available to them; their relationship with their own clients and other participants in native title processes; and, I might say, options for alternative delivery mechanisms for native title services, at least in some situations.

ATSIS, on delegation from ATSIC, has had carriage of the implementation of that part of the Native Title Act that deals with native title representative bodies. Given the key role that was envisaged for representative bodies in native title processes, this is and continues to be a very significant and burdensome responsibility. It involves providing funding for what we call the native title program within ATSIS—and, prior to that, in ATSIC—and supporting, monitoring and evaluating that program. We are required to advise the minister in respect of a number of key aspects of the representative body regime, and I should say that our role also extends to providing capacity building—supporting the development of the representative body system with a view to it being able to provide professional services to Indigenous people asserting native title rights.

With regard to native title and representative bodies, I say to the committee—and I think they are aware of this—that native title is a relatively new area of law in Australia. It has major implications for the human rights of Indigenous Australians, for land management, for resource development and for the rights and interests of other members of the wider Australian community. Again, I do not have to tell this committee that native title matters are complex. The law and the practices are by no means settled.

However, there is evidence that progress is being made and that results are being achieved. Much of the concern—if not hostility—from the wider community appears to have dissipated to a considerable degree. There is no question that the role of representative bodies is absolutely critical in native title matters. The high expectations placed on them in the scheme of arrangements for native title processes has been made clear by respective governments, from the original legislation in 1993 through to the amendments in 1998. There have also been significant problems with the representative bodies meeting those expectations. However, the consequent concern and dissatisfaction at times from the clients of representative bodies and other parties cannot be blamed on any one cause or any one stakeholder. Instead, it is probably true to say that in 1993 the enormity and complexity of representing the claims and interests of native title holders was significantly underestimated.

There has been a range of problems, and they go beyond the funding being made available to representative bodies. For example, the interaction between the courts and the native title legislation, especially after the 1998 amendments, has brought with it a whole raft of very complex legal issues to be worked through and resolved. Representative bodies as organisations have struggled to be effective in this environment. The appropriateness of the community organisation model on which representative bodies are based has been brought into question. The adequacy of the support that ATSIC's administrative arms and ATSIS have provided to the native title representative bodies is also another potential issue.

We have produced a background paper for the committee on the representative bodies and their roles, structures, functions and funding arrangements. We emailed that to your secretary late this afternoon. It is not the formal submission of ATSIS to the inquiry. Instead, that background paper attempts to provide the committee with a factual overview of the representative body system. It is not meant to provide a comprehensive analysis. We expect to provide that formal submission as quickly as we can. We are currently working on it.

The paper I have sent today outlines the history of the representative body system. These bodies were designed to give native title holders a voice in a system which is essentially about



their rights. Whilst the representative bodies have never had a monopoly of representing the interests of native title holders, experience has shown they need to provide a mechanism for native title holders to bring forward claims, for claims to be coordinated and to respond to development proposals. The need for such a mechanism is not only to protect native title rights but also to bring workability to the system for everybody.

The amendments made in 1998—controversial as they were in parliament, as members know—were, in part, designed to bring greater effectiveness and accountability to the representative body system. The committee should be aware that ATSIC played a role in the development of those amendments. Constructive dialogue led to amendments which, although problematic in some respects, can be seen to have improved the operations of the representative body system by providing a statutory basis for functions and by enhancing accountability mechanisms. The paper we have given you also outlines the functions and structure of representative bodies. It also identifies structural problems with representative bodies, including the possibility of conflicts of interest arising and the need to ensure the separation of powers.

I have other matters to deal with, but perhaps we could leave them. I do not want to take up too much of the committee's time at this stage. By way of introductory remarks, as I said, we expect that you will call upon us on quite a regular basis over the course of this inquiry. We look forward to developing a constructive relationship with you. For that reason, not only Alistair but also other staff of ATSIIS, who are directly involved in supporting native representative bodies, have attended this evening.

**CHAIR**—Thank you for that. Before I ask any of the senators to ask you some questions, I suppose I should set out that I believe that the committee would agree to having you address us again so that you can deal with and respond to any particular issues arising. So if you want to participate in every hearing—and I anticipate we are going to have a fair few around Australia—that would be most welcome. I anticipate that the committee would be pleased to have one of your personnel there and that you would be given the opportunity to respond before the committee considers its report. I presume that you expect that that is what will happen and I just want to assure you that that is the way I think we would proceed, without anticipating what the committee will do. I think that is the way we handled the last report. You observed how we handled everything then. It was done fairly efficiently. You will get a right to respond on issues arising. Mr Snowdon, would you like to ask some questions?

**Mr SNOWDON**—I apologise in advance that I have to depart in a quarter of an hour or so. There are a number of issues, one of which—and no doubt your formal submission will address this—is the number of rep bodies that have had administrators put into them. Without going into the details of each of them, I would be interested to know, in general, what the reason for that is. I assume a lot of it has to do with page 10 of your paper, which talks about human resources and the direction and management of the organisations through the quality of the human resources that are available. I am interested in exploring that a little further. As you know, we have had discussions about this previously. Whilst administrators are appropriate—I personally do not have any difficulty with administrators being used when required—I wonder how you actually ensure that you get functional entities operating in the longer term, bearing in mind the legislative requirements and the reporting. I will also ask you to comment very briefly on page 14 of your document, where there is a reference to the Miller review and the requirement to table

in both houses of parliament the annual reports of representative bodies. If that is to take place, how do you ensure it will take place? Do you actually have informative reports to be tabled?

**Mr Stacey**—On the issue about administrators and why they are being appointed, it might be useful if we got the terminology right, up front. As far as I know, there have not been many instances where administrators have been appointed to representative bodies, keeping in mind that, in this particular context, what we mean by ‘administrators’ is when the Registrar of Aboriginal Corporations, who administers the Aboriginal Councils and Associations Act, decides that the governing committee should be put to one side and an administrator should take over and perform their governance type functions. There have been instances since 1993 when that has happened, but I think it is important that we understand that when we talk about administrators in an Indigenous affairs context we mean that in effect a decision has been made that the governing committee, the board, is not able to perform its function satisfactorily and the registrar of Aboriginal corporations responsible for the day-to-day administration of the Aboriginal Councils and Associations Act approaches the minister and asks for the minister to agree to appoint an administrator. As I said, there have been only a few instances of that, as far as I recall, since 1993.

Nonetheless, there has been a high incidence of appointing so-called grant controllers, and appointing what we loosely call change managers. These are appointments that get made by us—that is, public servants working within ATSIIC and then ATSIIS who are responsible for administering the program. When we appoint a so-called funding controller or grant controller, it is on the basis that we have reached the view that, after a fairly lengthy process involving independent accountants reviewing the financial management of the organisation, in that particular instance they are not in a position to manage their funds and we need to appoint a grant controller to take over responsibility for approving expenditure.

We do not do that lightly. We do it after we have got the advice from independent experts, particularly accountants, and we have considered that with the organisation itself before we decide to do it. Change managers are a slightly different thing that we have also developed. Where we are satisfied that, after talking to the organisation and with its agreement, they are struggling to manage the day-to-day responsibilities they have as representative bodies, we have appointed a change manager to support them in improving their management structures and processes. Again, in the representative body system I would have to say there is quite a high incidence of us doing that.

**Mr Sherwin**—Wherever possible, those people are appointed with the agreement of the organisation concerned.

**Mr Stacey**—With regard to change managers, I do not think we would proceed unless we had their agreement, because it is meant to be a constructive, positive exercise to get some external support to assist them in overcoming serious management difficulties. With regard to funding controllers, we do retain an absolute discretion where we think, to protect the grant and the expenditure of public funds, there might be instances where we cannot get agreement when there is still a need to appoint a grant controller.

There is a high incidence. Why? There is no easy answer, and we will try to elaborate on what is in our submission, but I think it goes to the problems associated with community based

organisations having to perform very complex statutory functions under, in this case, the Native Title Act. It is no easy task. It goes to issues to do with the way in which Indigenous people often seek to govern and manage their organisations, sometimes in ways that are not going to meet the expectations of others. There is no doubt in our mind that these organisations do have serious and sustained issues around governance and management, at least in meeting the standards of the wider community or that the legislation sets or that governments set in the way they approach that issue, which often is not to facilitate some sort of separation of powers but rather for boards to consider that they should be able to make decisions about each and everything.

I think that there are probably other factors—whether the administrative arm in ATSIC has always been able to support the representative body system. It is a complex issue, but we will elaborate on that. Forgive me—that was a long question.

**Mr SNOWDON**—I do apologise. The second part of the question was just about the reporting requirements of the parliament.

**Mr Stacey**—I want to clarify that every representative body is required to produce an annual report to be tabled in the parliament, and they are doing so. As far as I know, no representative body for the last two years has fallen short of that. I admit that they have been late but, nonetheless, they have ultimately produced annual reports which have been tabled in this place.

**Mr SNOWDON**—The reason I asked those two questions conjointly is that they obviously impact on one another. I was concerned to ensure that, when we were discussing the capacity of organisations, one of the important parts for us was to cite the fact that they are having annual reports tabled in parliament. Chair, I thank you for your indulgence, and I apologise to our colleagues over here, but I have to go.

**CHAIR**—Thanks for coming. We appreciate your attendance.

**Mr SNOWDON**—I hope we have a constant dialogue.

**Mr Stacey**—Thank you, Mr Snowdon.

**Senator CROSSIN**—Mr Stacey, I should have brought the budget paper with me, but is there an additional allocation of funds in the proposed budget in relation to the administration of native title and representative bodies?

**Mr Stacey**—Not as far as I am aware. You might recall that, in the 2001-02 financial year, the government committed itself to an additional \$86 million being spent over a four-year period on native title, including representative bodies. This is the last year of that four-year period, and I assume that funding may be in the budget papers. I have not seen them.

**Senator CROSSIN**—Was the \$86 million additional?

**Mr Stacey**—It was additional to the base that was there up until 2001-02. The government decided as a consequence of a review of the overall funding levels to increase by \$86 million over four years the amount being spent by the Commonwealth on supporting Commonwealth institutions involved in native title. Some of that funding was ultimately made available to the

representative bodies. It may be that the budget papers this year refer to the final year of that four-year funding.

**Senator CROSSIN**—Is that around the \$20 million or \$21 million mark?

**Mr Sherwin**—For representative bodies for 2004-05, it is meant to be approximately \$2.2 million for capacity building and \$1.5 million for priority claims resolution, but it is probably best if we go to the budget papers.

**Senator CROSSIN**—I will have a look at those.

**Mr Stacey**—The 2004-05 figure you talked about seems about right to me. It is about \$86 million over four years, so it has probably been split up over four years.

**Senator CROSSIN**—I will have a look at that before the next time we meet.

**Mr Stacey**—The important thing is that, of that \$86 million over four years, not all of that went to representative bodies.

**Senator CROSSIN**—I understand that.

**Mr Stacey**—There is the Native Title Tribunal, which got additional funding. The Federal Court, Attorney-General's, got funding to support the respondents program. In fact, of that \$86 million, the representative body system got an additional \$17.4 million over four years. That is what I am assuming we are referring to. I am not aware of any new budget measure on native title being proposed.

**Senator CROSSIN**—I will have a look at that. I should have brought the budget statement with me, but I forgot to do that. I have a question about the comment you made on page 4 of your paper about the representative bodies being incorporated under the Aboriginal Councils and Associations Act. You say that the requirements of that act may not be altogether appropriate in the context of the service delivery. What is it about that act that might not be appropriate in your eyes?

**Mr Stacey**—The ACA Act goes back to 1976, so that is 27 years ago, and it was set up to give a relatively easy means for community based organisations operating within individual communities or community councils—I understand that only one community council has been incorporated—to incorporate. Representative bodies are regional or state based. They have to perform complex statutory functions. There is an issue in our mind in broad terms about whether or not that is necessarily the appropriate vehicle in all or many cases to incorporate those sorts of organisations.

**Senator CROSSIN**—Would you say that the Corporations Act would be better, or is that going in the other extreme?

**Mr Stacey**—Subject to consultation with Indigenous people in that region there may be circumstances where the Corporations Act may be a better vehicle for setting up a body to

provide those sorts of services. In fact the current service providers in Victoria and New South Wales are incorporated under the Corporations Act rather than the ACA Act.

**Senator CROSSIN**—Does the Aboriginal Councils and Associations Act need reviewing and amending? Has it not had a major overhaul since 1976?

**Mr Stacey**—You are getting close to asking me about a policy matter but I will say to you that the government has already announced that it does intend to bring forward changes to the ACA Act as soon as it can—

**Senator CROSSIN**—Let me ask you a question that is factually—

**Mr Stacey**—and it has not been overhauled since 1976.

**Senator CROSSIN**—I was going to say, ‘Factually then can you tell me whether it has been overhauled since 1976?’

**Mr Stacey**—There has not been any major overhaul of that legislation since 1976.

**CHAIR**—What precisely is the legislation?

**Mr Stacey**—We are talking about the Aboriginal Councils and Associations Act, which was passed in 1976, along with the land rights in the Territory—

**CHAIR**—I know exactly what you mean.

**Mr Stacey**—There has not been any major overhaul but, as I have said, I believe that the government has already announced that it is intending to bring forward some amendments following a number of reviews that have occurred over the last couple of years.

**CHAIR**—Have they been public reviews? Are we able to access what those reviews have done?

**Mr Stacey**—I will take that one on notice and get back to you about that. I think that the reviews have been public. Whether or not you can access what the government might have in mind as to what it is proposing to do—

**CHAIR**—No—

**Mr Stacey**—I am not sure about that but I am pretty sure that they were public reviews.

**CHAIR**—What about the Miller review? Is that one of them?

**Mr Stacey**—That review was requested by Philip Ruddock, the former minister. He wanted to look at the adequacy of the strategic plans being done by the representative bodies. It was not necessarily connected with the ACA Act; it was separate. Nonetheless, although we did not

publish that report at the time, on request we have been prepared to provide it to people and we will provide it to this committee—no difficulty.

**Senator CROSSIN**—On page 9 you provide us with a list of the funding that each rep body gets on a yearly basis. Is that right—the current financial year funding for each body?

**Mr Stacey**—Yes. It is annual funding—this financial year.

**Senator CROSSIN**—It is very useful, because we often hear that the rep bodies are underfunded. It would be interesting to ascertain from them why they believe they are underfunded. I suppose by reading their annual reports, if they are adequate, you would get a handle on what they are spending their fees on. But are they underfunded in that they do not have enough money to hire QCs, barristers, anthropologists or—

**CHAIR**—Genealogists?

**Mr Sherwin**—I think it is a combination of the issues that Brian mentioned earlier in addition to the workload issue and what drives the native title system. Once they have a certain workload in the system—a certain number of claims—if they are not very precisely prioritised, or factors outside their control such as the demands of courts and tribunals or other parties and the positions that people take, it can drive up the costs of particular matters in ways that are not expected. Some representative bodies have run into financial difficulties because of the matters they have on hand and they have prioritised them in a way where they thought they would be manageable within their cost base but, as the matters move through the system, they have found that the costs are in fact higher.

**Senator CROSSIN**—During the inquiry on the effectiveness of the Native Title Tribunal we found that they had a significant surplus. Are there any means by which any of these rep bodies can request additional funding on a case by case basis in any one financial year? Or is that their lot for the year and they have to make do with it?

**Mr Stacey**—What we do is make initial allocations for each representative body based on their application for funds. As part of that they have to produce an operational plan which shows how they are going to give effect to their strategic plan for that particular year. We make an allocation on the basis that there are not the funds available to meet all their requests. However, we do keep in reserve, if you like—for want of a better term—a contingency amount that we do not allocate initially, on the basis that in the course of the financial year there could be emergencies arise or all of a sudden the Federal Court, which we do not have any control over, could decide to bring forward a matter at very short notice and the organisation just does not have the funding to progress that claim at that time. Or there may be another crisis that may require some funding to support. So we do keep some back, but we do not have a formal additional estimates process, if that is what you are asking.

**Senator CROSSIN**—But if rep bodies run into a significant miscalculation of funds—

**Mr Stacey**—They are able to approach us and we will consider it on merit and, if we still have some funding available, we will consider it against what we have left. And they do that all the time.

**Senator McLUCAS**—How regularly would you make an allocation out of that on an annual basis, just in a general sense?

**Mr Stacey**—We normally start off by making an initial allocation at the start of the financial year, and the expectation is that they are going to live within that allocation. Normally what happens is that, in the second half of the year, we start getting bids. It is difficult to say how many we get; it is up and down. What I would say is that it has probably trended downwards. I cannot talk about the actual numbers, but it has probably trended downwards. Why that is the case could be one of the issues that you might want to talk about with the representative bodies. One of the reasons might be that they think, ‘We’re getting sick of Stacey saying no’—who knows? But I think it is trending down in terms of the numbers. But in this financial year, just to give you an idea, I think around six or so representative bodies have come back asking for additional funding.

**Senator McLUCAS**—How many of those would you be able to fund?

**Mr Stacey**—It gets complex—

**Senator McLUCAS**—Is it just what is left in kitty or do you have to make an assessment of their reasons for needing more money?

**Mr Stacey**—Exactly. And we might only provide part of it. We might say: ‘You’ve asked for so much. Yes, we can see that you are going to need additional funds for that purpose and we will provide a particular amount now. Then, in the next financial year, subject to budget, we will attempt to provide the balance.’

**Senator McLUCAS**—Who makes the decision to make that extra allocation?

**Mr Stacey**—All the funding delegations—certainly since 1996, since I have been involved—have always been exercised by public servants. It is normally the manager of the Native Title and Land Rights Branch, who is currently Alistair and was previously me, or it may be referred up the line. But it has been public servants working in the administrative arm of ATSIC—and then ATSI—who have made these decisions.

**Senator McLUCAS**—Are there criteria by which you assess the second round applications, if we can call them that—the contingency fund applications?

**Mr Stacey**—Normally we do not have a formal process. The reason for that is that we just do not have the sort of money available to meet the sorts of demands that might be placed on it, and we are reluctant to generate expectations that cannot be fulfilled. But we have our own network with the representative bodies and we will let them know in the course of the year what the overall funding position is. Through informal and formal meetings, we let them know and they tell us. But it is not a formal, additional estimates type process like that which, say, the government might go through. We do not do that because we just do not have the funds, and we would create a lot of expectations and a lot of work potentially for people, when we just cannot fulfil the requests that they are making.

The understanding is, however, that when we do consider requests for additional funding, we normally have regard to whether it is something of national significance that may assist in clarifying the law in relation to native title for the benefit of Indigenous people and potentially other stakeholders, or a major mining project where they might need funding in order to effectively represent native title claimants in negotiations. There are some large mines where we have had to provide additional funding in the course of a financial year because they are of national interest. So it is normally something that is of national significance. That is what we normally say. With respect to things which go to their day-to-day functions of preparing and researching claims, for example, or notifying claimants of potential future acts, we would not normally consider those sorts of applications. It is normally something that is extraordinary.

**Senator McLUCAS**—I might pursue this table on page 9 of your submission. How do you ascertain the proportion of funds that are allocated to each of the land councils?

**Mr Stacey**—We work around a process of annual applications which include operational plans which are designed to give effect to their strategic plans for that particular year. We also have regard to their overall performance, accountability and capacity to do what they are saying they propose to do. I should say that in broad terms, however, we do not have a specific formula, if you like.

There was a review of the representative body system in 1995, which I encourage the committee members to examine, which was done by ATSIC working in collaboration with CAEPR—the Centre for Aboriginal Economic Policy Research—and the Department of the Prime Minister and Cabinet. It was known as the Parker report. That proposed a mechanism for distributing funding, basically on the basis of their size. So statewide type representative bodies such as land councils might get more—a certain amount for their operational costs—and smaller ones which were regionally based would get a smaller amount for their operational costs. Loosely, that still applies, but increasingly we are relying on performance, accountability and planning that reflects the strategic plan as a basis for how we might go about distributing the funds.

**Senator McLUCAS**—What is the level of transparency? I am trying to understand the process. From time to time various land councils will complain, ‘So and so got more than they should have and we didn’t get enough.’ What do you do to allow all the applicants to understand how you have come to that decision?

**Mr Stacey**—We provide comprehensive advice about making funding applications: when they should do it, how they should do it, the sort of information that has to be provided. We advise people about allocations to representative bodies on request. We treat it as public information. For example, if someone says, ‘Someone else got more funding than we did,’ we will outline the relevant information and the reasons why we made the decision we did. But it does start with a formal process—which I think is pretty well acknowledged in the representative body system—of seeking applications and assessing those applications. The other vehicle we have for dealing with these issues is a CEO forum that meets every three to six months, where these issues get put on the table and discussed.

**Senator McLUCAS**—Is the information in that table public or is it something you would want to keep confidential?



**Mr Stacey**—No. It is public.

**Mr Sherwin**—In the AT SIS annual report, the AT SIC annual report, all the information appears about the total budget and the amount that went to each representative body.

**Senator McLUCAS**—At the bottom of that table is something called ‘Other initiatives’. Is that the contingency fund? It is just over half a million.

**Mr Stacey**—I might have to ask Alistair about that. ‘Other initiatives’, \$519,634—is that for capacity building?

**Mr Sherwin**—I think it is for capacity building.

**CHAIR**—You can take it on notice.

**Mr Stacey**—We will take it on notice. We will get back to you about that. We will clarify the process a bit more.

**Senator McLUCAS**—That is fine. Can I track back a bit. It is an issue that has troubled me for some time. I understand the process that the Miller report recommended—that there needs to be developed a series of strategic plans and out of that will come the annual operation plans. That is well and good, except there seem to be other factors that will affect the actual operation of a land council or a native title rep body. In good faith they go ahead and write the strategic plan, do as much research as they possibly can to inform that, and then the court will say something or an application will come out of left field that no-one knew about and blow it out of the water. Everyone tries really hard to do proper planning, but in this area of delivering native title services or delivering representation to native title applicants it is almost impossible to plan properly. Is that a silly analysis of the situation?

**Mr Stacey**—No, it is not silly.

**CHAIR**—Do you think that was a leading question!

**Senator McLUCAS**—‘Am I stupid?’—was that leading?

**CHAIR**—Nevertheless, be invited to be led!

**Senator CROSSIN**—It would have been okay if you had said yes.

**Senator McLUCAS**—You can say that! I am actually honestly asking that question, because I just do not understand how you do it properly.

**Mr Stacey**—It is a good question. I am not going to say that I think the whole process of funding—the methodology we have and the process we use—is perfect by any means. I certainly think that is an area that we need to continue to look at. There are a couple of things. The first is that I would not want you to get the impression that we make judgments about funding based around ‘this is what you said you’re going to achieve in your strategic plan and you haven’t achieved it’. It is not as simple as that. That is because we know that there are so many things

which are outside the control of the representing body. It is not some simplistic exercise, with us saying: 'This is what you said you're going to achieve. You haven't achieved it, so we're going to cut it or we're not going to fund you.' It is more complicated than that. It is more of a dialogue process. We have a constructive dialogue and we look at reasons around the overall performance and why this has been achieved and why that has not been achieved.

The second important thing is that somebody can come along and think that a particular claim or something has been blown out of the water because another group has intervened or something. You are quite right—that is what does happen. But it is important to understand that we are not funding representative bodies on the basis—and this might sound a bit strange or silly to you—that they necessarily get outcomes that you might think are outcomes under the Native Title Act.

**Senator McLUCAS**—I understand that.

**Mr Stacey**—That is, a determination of native title or an Indigenous land use agreement. We are funding them on the basis that they provide professional services to those people who have native title rights. The Native Title Act outlines, in terms of functions, what those professional services amount to. You could end up in a situation where the claims that a representative body are progressing may not, for a whole lot of reasons, get a positive determination in the Federal Court but they could still be funded to the same level next year. While I do not want to make it sound silly, as if we do not have regard to the overall outcome of what people are doing, we do not sit there and fund on the basis that we think that a representative body is there to get a positive determination of native title or to secure an agreement. That would be totally unreasonable because that is dependent on another party being prepared to enter into an agreement. It is dependent on what the Federal Court does and it depends on the state and territory governments and the Commonwealth, which are often respondents. What we are interested in doing is making sure that they provide professional services, and that is increasingly how we are trying to make assessments about the funding we provide.

**Senator McLUCAS**—It is a very important point that you measure success not by the number of agreements made but the services delivered.

**Mr Sherwin**—Could I just quickly add that, while there are many variables outside the control of native title representative bodies, the act does impose on them the requirement to have a strategic plan approved by the minister. We think it is important for them to have not only that strategic plan but also an operational plan and try and plan their service delivery as best as possible while both they and we acknowledge that they may get buffeted around by forces beyond their control.

**Senator McLUCAS**—I agree that there needs to be a plan in place, but that we have to recognise that that plan will probably change. The funding for the Strategic Priority Claims Resolution Program is, I think you said, \$2½ million in the current financial year. That is on page 10. How do you allocate those funds?

**Mr Sherwin**—When they put their applications in before the start of the next financial year, they are meant to look at all their funding needs. As far as I recall, we do not have a separate process of seeking applications and assessing them with respect to the priority claims funding.

We expect them to identify all their needs against a plan. However, in our terms and conditions of funding, we identify criteria that will have regard to making decisions about whether to provide any funding for litigation—in effect, priority claims resolution. They go to the merits of the case—whether it is nationally significant, whether they have independent legal advice that supports running a case et cetera. It is in our terms and conditions.

**Senator McLUCAS**—And they are known and published?

**Mr Stacey**—Yes.

**Senator McLUCAS**—There have been three reviews that have occurred over the native title representative body structure. It seems to me that that is a lot in a fairly short period of time. I am aware that the Miller review was requested by the minister in response to requiring a more strategic approach to the planning and delivery of services, but I wonder if you could give me the motivation, from your understanding, behind the instigation of the 1995 and 1999 reviews. You may want to take this on notice or just make sure it is part of the substantive submission.

**Mr Stacey**—My perspective, and I will have it tested and confirmed in the submission coming forward, is that the 1995 review was instigated by ATSIC. It was a result of concerns about whether the way in which the funds had been distributed up until then—since the Native Title Act was passed—was effective. Up until that review, considerable amounts of funding were being granted directly to specific claimant groups to engage their own experts to pursue their own claims. The concern was that this was resulting in no coordination of the claims, no prioritisation, a lot of overlaps and, frankly, quite a bit of chaos, particularly in areas such as the WA goldfields.

The ATSIC board at that stage decided to initiate a review with a view to saying, ‘What is the best means of representing native title claimants so that we do not end up in this situation where there are all these overlaps?’ The way we were funding it seemed to be contributing to more intra-Indigenous conflict. It was a result of the 1995 review that a statutory regime was proposed for the native title representative body system, with clear functions and accountability obligations, on the basis that there would be only a single representative body for any particular area. I think the 1995 review was an important review, and it did provide the foundation for the system we have now.

The second review was the so-called Love-Rashid review. As I recall, that was done in 1999. Just for the record, it was done after a public tendering process. We ultimately engaged a consulting team made up of Mark Love, who is a senior lawyer who works for Corrs Chambers Westgarth, as well as a local firm here in Canberra—Senatore Brennan Rashid accountants. Following the amendments made to the Native Title Act in 1998, it was designed to review whether the funding was sufficient. Again, that was initiated by ATSIC.

It was designed to produce an independent report that the government could consider properly to see whether or not the funding that was being provided for the representative body system was adequate, particularly to meet their additional and more complicated functions and accountability arrangements following the 1998 amendments. Again, that was initiated by ATSIC. The third one—you explained it—was initiated by the minister. It followed him having to approve some 20 or so strategic plans of representative bodies. It looked at what the benefit of

that exercise was, whether or not the plans were meaningful and how we could make them more meaningful. That was instituted by Minister Ruddock.

**CHAIR**—You mention that at the top of page 14 of your submission. You have very kindly set out the reviews and reports, which are of great assistance to the committee. You mention that the Miller review concluded that all of the minister's responsibility under the act had been met, with the exception of the requirement to table annual reports. Do you have a view about the tabling in both houses of annual reports of rep bodies? You might want to take that on notice.

**Mr Stacey**—The act requires it. The committee would probably be in a better position to say whether or not they consider it to be beneficial that representative bodies produce annual reports. But I can say to you that it has been quite resource intensive. Quite often, representative bodies have struggled to meet the standards that parliament sets for annual reports to be tabled.

**CHAIR**—It strikes me that that is one of the questions we should ask the rep bodies as we travel around. We should put the proposition to them and give them examples of what an annual report comprises and the requirements for annual reports. Given my knowledge of rep bodies—which, I might say, is fairly limited—it strikes me that it is an unrealistic expectation in many respects. Do you accept that?

**Mr Stacey**—I do not want to express a view as to whether or not I think they should do it. I can see that there are some benefits to producing an annual report for parliament. We have tried to make that the major accountability tool so that we are not burdening them with a whole lot of other things to do in the course of the year. Nonetheless, it is certainly resource intensive. Quite a few organisations find it difficult, particularly the community based ones. The northern and central land councils in the Territory are statutory land councils set up under the land rights act and are also representative bodies that have been producing annual reports to lodge in parliament since the early 1980s. It took them quite a time before they could produce annual reports. Now it is pretty routine for them, but it has been quite a struggle for those community based organisations. It is not an easy task. I think it will take some time yet before others are able to meet the requirements that parliament has set.

**Senator CROSSIN**—Following the three reviews, particularly the 1999 review and the most recent one, have changes been put in place? Have the recommendations of those reviews been picked up? I can see that the capacity-building money perhaps picks up the corporate governance issue of the 1999 review. But the workloads of the native title rep bodies were significantly higher than funding allowed, so have the recommendations been addressed?

**Mr Stacey**—If, by 'addressed', you mean whether they have been examined and considered, the answer is yes. But that does not mean that the government has agreed with all of the recommendations, for example, in the Love-Rashid report of 1999—it has not.

**Senator CROSSIN**—Obviously, no, because native title rep bodies still believe that they are significantly underfunded.

**Mr Stacey**—Correct.

**Senator CROSSIN**—But I am assuming the corporate governance one has been issued with the capacity-building money.

**Mr Stacey**—I will go back to the 1995 review. I think it is important to say that the recommendations were addressed and, to a very large extent, implemented. It was in fact the current government which put in place the statutory scheme for representative bodies, which was the key recommendation of the 1995 review. With respect to the 1999 review—

**Mr Sherwin**—Also, additional resources were provided with the 1995 review.

**Mr Stacey**—Yes. I should say that the current government continued to provide the same level of resources when they came to office. In terms of the so-called Love-Rashid review of 1999, it was addressed in the context of a subsequent funding review. While they were not prepared to contemplate the sorts of amounts that Love-Rashid was saying were required, from its point of view, to adequately fund the system, they did ultimately put more funding into the representative body system starting in 2001-02, as I explained. Representative bodies got \$17.4 million out of that \$84 million. As for the Miller review, again, that involved consideration not just by the government but also, more importantly, by ATSIIC. The recommendations were addressed and we are still in the process of implementing those recommendations.

**Senator McLUCAS**—Can I go back to that \$86 million over four years—those additional funds. I would like your comments on the practicalities of what is happening in the work of the rep bodies. It has been put to me that, whilst that additional money was welcomed, the fact that there was considerable additional money given in particular to the Attorney-General's Department triggered more work. So, whilst \$17.4 million was some money, the fact that there was about \$30 million all up in A-G's—I do not know that figure; I have forgotten it—almost triggered as much work again on behalf of the rep bodies. I do not know if you have any comments about the interrelationship of effort by claimant organisations and rep bodies because of the institution of the A-G's fund and the impact that had on their workload.

**Mr Stacey**—Our view about that is that it may well be the case in quite a few instances. It was an issue that was considered when they were talking about the additional \$86 million. I think what we achieved at the time the government gave the additional \$86 million was not so much that we got a bit of additional funding for representative bodies but rather that we got the government and agencies involved in native title to understand that this was a system. It was not just a case of the tribunal doing things and the Federal Court doing things without their work impacting on others. This was a system that was integrated. The way in which one part of the system operated was going to impact on the others. Up until then I do not think we had an understanding of that within the government. That, from my point of view, was probably the major achievement of the review that led to the additional \$86 million, more so than the fact that we got any additional funding.

On the issue of how to deal with the concern that I know land councils, particularly in the north, have talked about where they have said, 'The tribunal got quite a bit of extra funding out of that review and that has resulted in a lot more pressure on us,' you might want to seek a view from the tribunal about that as well. I think that is important. But one thing that came out of that time when they provided the \$86 million was also a formal vehicle within the government to try and better coordinate between different parts of the system. So there is a vehicle for the agencies

to meet together on a regular basis to try and better coordinate the workload and have regard to where there are serious work resource shortages—to try and find a way to respond to that by better coordination.

**Senator McLUCAS**—Are you saying that an application to the fund would only be funded if it were in concert with a plan from the appropriate native title rep body? I do not think you are saying that.

**Mr Stacey**—No.

**Senator McLUCAS**—Then I need to understand how this coordination works.

**Mr Stacey**—It works by Attorney-General's bringing together institutions such as the tribunal and ATSI—then ATSI and the Federal Court—on a fairly regular basis to talk about workload type issues across the whole system and how we can better manage those. I did not want to give the impression that somehow or another that committee had taken over the function of individual agencies to assess and make decisions about individual funding applications, because it does not. It was a mechanism to try and respond to the sort of issue that you are raising about getting additional funding to one part of the system, such as the Native Title Tribunal or the Federal Court, and the consequences that might have for other parts of the system in increasing their workload.

**Mr Sherwin**—There is direct communication between the Federal Court and offices of ATSI. In Queensland, for example, over the last six months the court, through their case management conferences, generally in appearances before registrars and deputy registrars of the court, have asked for ATSI officers to appear to give a brief account of the funding processes for native title representative bodies—what funds are available to individual rep bodies and what the constraints are for them. This has happened in the context of judges in Queensland expressing a general view—through directions, hearings and other forums—that they are likely to be bringing more matters on for trial in Queensland, so they are interested in the resource implications of this and how ATSI can respond. They are asking, 'Can you move resources to respond to this?' and, 'What is the capacity of this representative body? What is its budget et cetera?'

**Senator McLUCAS**—I understand that the Queensland courts have said that they are going to have one matter per land council per year.

**Mr Sherwin**—Per region—with one in reserve in case that matter does not proceed.

**Mr Stacey**—I think what Alistair is saying is that other coordination mechanisms have slowly developed as well with a view to trying to address this very issue that you have raised. I concede straightaway that it is an issue. One part of the system and what it is doing is going to impact on the other parts. We were able to get a recognition of that. At the federal level, as I said, there is a coordination mechanism, but the Federal Court started its user groups as a means of trying to bring all the stakeholders together. The tribunal has other mechanisms in place to try and find ways to better coordinate so we ameliorate that problem that could potentially arise.

**Mr Sherwin**—Senator, your original question was about cause and effect within the system. I think it can be quite difficult, given the complexities, to spot the causes and the effects—what is driving up the costs for representative bodies and whether the resources going to other parts of the system are having a direct effect or whether organisations are just using them to cope with what they have on hand.

**CHAIR**—When Mr Snowdon asked you, Mr Stacey, about the number of administrators, grant managers and change managers, I am not sure whether we confirmed anything. I would like to see a list. Is that too much of a difficulty? Also, could we have a small precis on what the common thread was with regard to the necessity for those personnel and possibly on the resolution of that matter—on what happened? Did the assistance of, say, a change manager or a grant manager bring forward a successful outcome so that ultimately that person was withdrawn and the council went back to administering its own affairs on a more direct level? I would like a bit of information about our historical experience in this regard, looking for some lessons and some common threads if possible. Do we have 17 representative bodies?

**Mr Stacey**—Yes. To respond, we can provide that. We would be happy to provide that to the committee, although I hope you would appreciate that it perhaps is not best if we identify the individual representative body concerned, necessarily.

**CHAIR**—I accept that.

**Mr Stacey**—We would try to provide it on a national basis in terms of numbers and an analysis of what is going on. That would assist you slightly better.

**CHAIR**—I do not think we need to know the names of the representative bodies. We need to look at the systemic issues, if we can have them. With respect to New South Wales and Victoria, it strikes me you have a different regime. Tell me about it.

**Mr Stacey**—To answer the initial question, there are currently 15 recognised native title representative bodies. In addition, we are funding what we call native title service providers in Victoria and New South Wales. What occurred in each respective state is that first of all the existing bodies that had been recognised in the case of New South Wales surrendered their representative body status. They did that voluntarily. We in fact asked them to delay it to give us an opportunity to negotiate with Indigenous people with a native title interest in that state about a process to set up an alternative service provider—at least on an interim basis—so we did not have a situation of potentially a serious gap where an organisation had surrendered its status and we did not have an alternative arrangement in place.

**CHAIR**—When did that happen?

**Mr Stacey**—In New South Wales it was 1999-2000—over the course of those two years.

**CHAIR**—Was there any explanation as to why they withdrew? What was the motivation?

**Mr Stacey**—The New South Wales Land Council took the view that it was interfering with their core business.

**CHAIR**—Which was what?

**Mr Stacey**—Performing their functions under the New South Wales Land Rights Act.

**Mr Sherwin**—Under which they were created.

**CHAIR**—So they elected for a state regime, in other words.

**Mr Stacey**—They were set up under the New South Wales Land Rights Act 1983 and were recognised as a representative body initially at the end of 1993 or in early 1994. Then they were re-recognised in the process that we went through after the amendments to the act in 1998. However, they decided to surrender it voluntarily because they said that it was interfering with their core business and that it was often leading to conflicts between those people asserting rights under the New South Wales Land Rights Act—which is not an act based around native title—and those people asserting native title and that that was too much of a burden on their organisation to perform. So they surrendered voluntarily.

**CHAIR**—Would it be fair to say that they saw too much difficulty in terms of conflicts of interest?

**Mr Stacey**—I think that was certainly a factor.

**CHAIR**—How many claimants under the native title regime—the Commonwealth act—were adversely affected by that resolution of the then New South Wales Land Council?

**Mr Stacey**—I cannot talk to you about numbers of claimants in raw terms like that.

**CHAIR**—But there were enough for you to need to go out and retain the services of someone else.

**Mr Stacey**—There were enough. But we certainly saw adverse consequences for claimants if we did not seek to set up an alternative service provider, so we obtained the agreement to delay their decision to surrender their status in order that we could commence negotiations with ATSIC and other Indigenous people with native title interests in that state about setting up an alternative service delivery arrangement. In this instance, we set up a company called New South Wales Native Title Services. That is based in Sydney and has offices in Coffs Harbour and Dubbo. It has now been the service provider for four years.

**CHAIR**—It has contracted with ATSIC/ATSIS?

**Mr Stacey**—Yes. I will clarify what that means. It receives annual grants from us on the same terms and conditions as representative bodies do.

**CHAIR**—So it is not actually a formal contract.

**Mr Stacey**—No.



**CHAIR**—They receive a grant and they have to comply with the broad principles that you apply to representative bodies.

**Mr Stacey**—Not just broad principles. We require them to meet all the obligations and operate in the same way as a representative body would under the Native Title Act.

**CHAIR**—Who is the beneficial owner of the company?

**Mr Stacey**—I might have to take that question on notice, because there might be a specific response.

**CHAIR**—Shareholders and directors?

**Mr Stacey**—Yes, but I will just be clear: the Indigenous community of New South Wales is ultimately the beneficiary. This is not a private company.

**CHAIR**—So, whomever it is, they are trustees?

**Mr Stacey**—In effect, yes. This is not a private company making a profit; this is a company incorporated under the Corporations Act that is there only to provide native title services. I would have to take on notice who the owners and beneficiaries are, but I better make it quite clear to the committee now that we are not talking about a company operating in the private sector and making a profit.

**CHAIR**—It is not a private contractor?

**Mr Stacey**—No, it is not.

**CHAIR**—Do they have an annual audit and an annual report to you?

**Mr Stacey**—Yes. We did not of course table the annual report of the New South Wales Native Title Service, but we are in a position to provide this committee with the annual reports of both organisations, if you would like.

**CHAIR**—We would appreciate it.

**Mr Stacey**—There is also a similar arrangement operating in Victoria.

**CHAIR**—I was just about to get to that.

**Mr Stacey**—We can provide similar information.

**CHAIR**—We would like to see that. What about Tasmania?

**Mr Stacey**—We have never had a representative body there, and nor have we ever funded an alternative service provider. That goes to the fact that native title activity in Tasmania is very low.

**CHAIR**—Some argue that there was total extinguishment, don't they?

**Mr Stacey**—I think a claim has been put from time to time. Most of Tasmania is private freehold, so the High Court has already ruled that that extinguishes native title forever. Obviously, that is one reason, but I would not want that to lead you to think that Indigenous people in Tasmania do not consider that they have significant outstanding land needs, because they do and they are very vocal in putting those views across.

**CHAIR**—That is right. But those claimants would not be under the auspices of a representative body necessarily?

**Mr Stacey**—I think there may be a claim. In these circumstances, if there is not a service provider, they have to approach ATSIIS directly, as they are entitled to do, make an application for a grant and have it considered on its merits. But as far as I know we have not provided any funding for any Tasmanian group at this point.

**CHAIR**—I am looking at page 8, at your very informative and helpful map of your representative bodies. The thing that always interests me is how you go about dealing with the funding along the state borders. As I understand it, there must be a number of claims that traverse state borders and necessarily traverse these representative body boundaries. What mechanisms do you have in place to resolve all that? Do you just accredit the claimants across into the various land councils and say, 'Notwithstanding that you run across the border, we're going to put you on this side of the fence and we'll fund you from there'? How do you do it?

**Mr Sherwin**—Just quickly, before we get onto that, the map reminded me—there are 15 native title representative bodies on mainland Australia, just to correct our earlier numbers, plus the Torres Strait Regional Authority.

**CHAIR**—So there are 16.

**Mr Sherwin**—Yes.

**CHAIR**—That is the figure that I thought was correct.

**Mr Stacey**—Sorry about that.

**CHAIR**—That is all right.

**Mr Stacey**—In fact, the statutory scheme for representative bodies in the Native Title Act covers the situation you are talking about. Basically, where you have a claim that is overlapping the boundaries of two different representative bodies, whether it is a state boundary or not, as I recall it the rule is that the claimants decide on one representative body that they prefer to represent them.

**CHAIR**—So they elect which one they want.

**Mr Stacey**—Yes. To be honest with you, it is normally where people are living. If they have a claim that, say, overlaps between WA and South Australia—and I think there are a few

overlapping claims down the bottom, between the Central Desert and South Australia, for example, in that desert area there, but the groups live around the Spinifex area in WA—they elect to use the representative body of the region they are living in, for obvious reasons. But, under the act, if it is overlapping into the boundaries of another area, they have to consult the other representative body and seek their agreement.

**Mr Sherwin**—And I think the scheme in the act envisages that representative bodies will work together to come to an agreement about managing those overlapping claims, and there are mechanisms spelt out about how they should come to agreed arrangements.

**CHAIR**—That is the point I am getting to. Are we facilitating that, or what is your experience with the success of that sort of interaction?

**Mr Sherwin**—I cannot remember any concerns being raised in recent times, but I think there were, certainly, much earlier on, in the bedding down of the act. But I do not know how many problems there have been since the 1988 amendments or whether the provisions in the act have bedded that down.

**Mr Stacey**—I think we continue to have problems with this issue in Queensland. There are quite a few disputes that seem to regularly surface and seem to me to be pretty familiar—they might have started quite a few years back. I do not think we have a problem in places like the Northern Territory. There were some problems earlier in Victoria and New South Wales, but I think they have largely resolved themselves. I think, in time, we are starting to see things sorted in WA too. It is a general response, I know, but we seem to continually have problems in Queensland, particularly.

**Senator McLUCAS**—Can I interpose just there. I wonder, in your submission, if you could spend a bit of time talking about that issue for Queensland and in particular about the boundaries of the TSRA and Cape York—

**Mr Stacey**—That is a good example.

**Senator McLUCAS**—I am sure you know the story.

**Mr Stacey**—Yes.

**Senator McLUCAS**—I would be interested in ATSI's involvement and what role you play in trying to assist in the resolution of that particular dispute, maybe as a bit of a case study.

**Mr Stacey**—You want a case study? All right.

**CHAIR**—I see that you seek—I think that is the best description—an operational plan. What strictures are you looking for within rep bodies in terms of their operational template, if you like? Each of them is an incorporated body, they are all councils, they have council members, they have a constitution and they have to be audited. Correct me if I am wrong in saying that, because I have experience with just one or two. Do you have a template of a checklist for what each rep body has to do on an annual basis in order to receive your funding or to hold your confidence, if you like? I know that you said, 'If we applied really formal criteria and evaluation

we would have some problems,' and I accept that. When I read the act I see that a lot of those things are, I am tempted to say, unrealistic, but nevertheless they are in the act. What do you demand of the bodies as a minimum in the way their corporate governance goes?

**Mr Stacey**—First up, to be eligible to be recognised as a native title representative body, the organisation concerned either is incorporated under the Aboriginal Councils and Associations Act or it is a body that was recognised as a representative body at the time when the amendments in 1998 took effect. That provision was put in to enable statutory authorities—like, say, the Northern Land Council or the Central Land Council in the Northern Territory, or the Torres Strait Regional Authority, which of course is a statutory body under the ATSIC Act—to also be recognised as representative bodies.

The second point you talked about was presuming that they have to provide annual audited financial statements. That is absolutely the case. Annual reports are prepared for the parliament by representative bodies, and that includes, of course, the Northern Land Council, the Central Land Council and the TSRA. They have to include audited financial statements up to the standard that would normally be expected from a statutory authority. That is quite a high standard.

**CHAIR**—Sure. And has it been a problem?

**Mr Stacey**—Yes, undeniably.

**Mr Sherwin**—There were a couple of annual reports this year where people had a problem in complying with those provisions of the act and there were some addenda tabled—

**CHAIR**—Some qualifications?

**Mr Stacey**—I am not aware of any rep body which got a qualified audit, which means that the auditors decide that they do not think the financial statements that have been presented to them are a true, accurate and fair record, and it is a very serious matter.

**CHAIR**—So there were no qualifications.

**Mr Stacey**—There have not been any qualifications, but producing it in the format to the standard that is required has taken most of the representative body system quite some time to fulfil. Even the more experienced bodies, like the NLC and the CLC, which have been in this game for a long time, have struggled. Even this year I think that one of them—the CLC, the Central Land Council, had to put in an addendum because, with the audited financial statements that they included in their annual report, they did not have a separate statement outlining their income and expenditure for the ATSIC grant for native title purposes specifically, and that is what the act envisages that they have to do.

For example, TSRA, the Northern Land Council and the Central Land Council are getting funding from other sources to perform functions under other legislation. While they do not have to produce a separate annual report—they do not have to produce two annual reports for the parliament; they can still produce one report—they still have to have separate state-audited financial statements for native title. Those are the sorts of problems that are arising.

**Mr Sherwin**—They are complying with more than one annual reporting regime as set out by parliament.

**Mr Stacey**—Yes. I do not want to present a picture that somehow or another we are getting all these qualified audits.

**CHAIR**—I think you have painted a clear picture that that is not the case. It is a technical matter rather than a substantive issue.

**Mr Stacey**—It is more technical than standard. Nonetheless, I certainly think that quite a few rep bodies continue to have difficulties.

**CHAIR**—When you see a difficulty, shall we say, in an audit, what do you do about that? What is your response? Is there a standard response?

**Mr Stacey**—It depends. We do not just turn around and say, ‘We’ve cut off your funding’—

**CHAIR**—Good.

**Mr Stacey**—or ‘You’re about to get a rocket or something from the minister saying, ‘We’re about to withdraw your recognition.’ It is more a case of—

**CHAIR**—So there is some flexibility in the system?

**Mr Stacey**—Yes. An annual report gets submitted to us before it goes to the minister. We review that annual report to determine whether it meets the standards in the Native Title Act and flowing from that act. If it does not, we write back to them and say, ‘We don’t think the annual report does this. We note that this hasn’t happened.’ From there we expect them to have regard to that feedback and ultimately produce a final report to the parliament. Sometimes it does not work out like that because of statutory deadlines for producing annual reports. They have to meet the same deadline that any government department has to, which is 15 October after the end of the financial year. The report might end up being submitted to the minister without us having an opportunity to see it beforehand. We work on the basis of providing constructive feedback with a view to getting the representative bodies to respond to that feedback before doing the final reports.

For the committee’s information, we are currently working with representative bodies on developing new strategic plans. Their current strategic plans, lasting three years, finish on 30 June this year. We are working through a process with them of drafting new strategic plans before they get submitted to the minister. It is more a process of producing a draft and giving us an opportunity to provide constructive feedback, I hope, with a view to reaching some agreement about how to proceed. I think that approach has worked quite well.

As I said at the start, the fact is that every rep body has tabled an annual report. I know it has been late in some cases, but when you think that we are dealing here with community based organisations that, in many cases, do not have long histories and are operating in remote parts of Australia, to ultimately produce annual reports that meet the same standards that a government department does is a pretty good job.

**CHAIR**—That brings me to the next point. We will come back to the councils themselves in a moment. Regarding the rep bodies, what do we have in place with respect to the capacity and capability of building and training the staff involved in the day-to day-administration? Do we have a system in place where ATISIS brings them together? Is there a system of education that brings out the common threads that are required by each of them in terms of corporate governance knowledge?

**Mr Stacey**—There is a range of initiatives that we fund out of what we call the NTRB capacity building program. That came about as a consequence of the additional funding that was made available in 2001-02.

**CHAIR**—The \$17.4 million?

**Mr Stacey**—Yes, and I think \$11 million of that is for the capacity building program and the balance is for the priority claims resolution. The initiatives are directed towards improving governance management and also the professional skills of staff. But I should also say that it is not just ATISIS providing support; the Native Title Tribunal has also engaged in a number of initiatives to try and support improvement in the skills set and capacity of professionals and others working in representative bodies. I mentioned before the CEO forum, which has now become the NTRB CEO forum. That has become a regular feature every three to six months. It is difficult to get 17 or 18 CEOs together in one place at one time.

**CHAIR**—Sure.

**Mr Stacey**—In fact, on the last occasion we had a leaders forum and we invited the chairs of the representative bodies as well. One major way in which we try and support capacity of staff is by providing additional funding for the representative bodies to attend the annual native title conference. That conference, for the committee's information, is held from 2 June to 4 June. This year it is being held in Adelaide. We fund it.

**CHAIR**—It was in Alice Springs last year?

**Mr Stacey**—Yes, and in Geraldton the year before. We provide additional resources to the representative bodies to enable committee members and staff to attend those. Part of the conference is also to have training sessions for field officers, for example, to make them feel that they can actually get access, because often we find those people tend to miss out. So we try and focus on those Indigenous staff particularly—field officers coming to the national conference. I might say I hope that the committee is aware of that national conference.

**CHAIR**—We are hoping to have a rep there.

**Mr Stacey**—It would be great if you could have a representative there.

**Mr Sherwin**—There is corporate governance training, where we have been employing someone to go out to representative bodies and work with the staff and the boards of those bodies to train them in governance and administration issues.

**CHAIR**—I think we would like to see your curriculum. We would like to get into the nitty-gritty of what you are impacting upon them so that when we get out there to the rep bodies we have some concept of the sorts of objectives you are seeking to achieve in your capacity building. I think we need to get into that sort of detail.

**Mr Stacey**—That would be fine. Let me say, I think you led the questioning off by talking about wanting to see what sort of information they had to provide for annual funding.

**CHAIR**—Yes.

**Mr Stacey**—I think it would be best if we just provided you with the relevant documentation for you to review, including the operational plan, pro formas and other things we have developed to try to support those bodies and what we seek in terms of funding applications.

**CHAIR**—We would appreciate that.

**Mr Stacey**—I heard you say, Senator, that you are envisaging visiting quite a few rep bodies. I know you mentioned that at the start, and we would be happy to have a representative there if the committee—and the representative body, I might add—were agreeable to that, because I do not want to create a situation where the representative body feels that it cannot be as open as it might want to be.

**CHAIR**—That is a very valid point and I appreciate and thank you for that.

**Mr Stacey**—I did make the point at the start that I do not exclude ATSIC and ATSSIS from being a factor in terms of the overall performance and accountability of the representative body system and how public servants like me perform our duties in a way that does not impact on what they do. I do not want to stifle somebody from coming forward and saying, ‘Quite frankly, we are fed up.’

**CHAIR**—‘The service is terrible’.

**Mr Stacey**—Yes, so subject to that, it would be fine.

**CHAIR**—We will inquire with the rep body to make sure that they are comfortable with who is going to be there. If there are any issues, we will certainly let you know.

**Mr Stacey**—I am not meant to be taking up the questioning, but were you planning to do that in June or July?

**CHAIR**—We have a rough schedule, which has become a little more concrete lately. We will give you a copy of the schedule so you can see what the committee intends. As you well know, the committee’s function is to make recommendations. That does not mean that government is going to listen to us, but, to some extent, recommendations do not necessarily have to be in a vacuum. You can indicate some areas in which you think there would be a better way to go—things that might facilitate the capability building, particularly. Be bold in your submission. You live and breathe these issues, and we are going to take a long time to come up to speed on what

are some complex issues. Raise issues that you think need attention—that is an invitation for you to feel disposed to be flexible in your commentary.

I do not have much more to ask you, unless there are any matters arising from what I have said with other senators. The thing that I would be looking to explore with the representative bodies is their capacity and success in understanding their statutory role and function. It is all very well to look at the act—as I indicated to you previously, it is extraordinarily complex. From my experience, the council do not have any real knowledge of what the obligations are. It always causes me great concern that it is a fairly technical statutory framework and base from which they are working and they do not really have a great knowledge of it. What are we doing about that, if anything? How are we going about trying to bring them up to the sort of level that the act, to some extent unrealistically, expects?

**Mr Stacey**—I do not recall any specific initiative, but I think we might cover that in our submission when we talk about what we do under the capacity building program. I think you are talking about education awareness about what is in the Native Title Act.

**CHAIR**—What is it to be a councillor? What responsibilities are there?

**Mr Stacey**—Alistair mentioned that one of the initiatives that we have had under way for some time now is to have a visiting specialist, who has worked with Aboriginal communities for a long time and tries to assist people to get a better understanding of their duties as directors and to appreciate some of the implications of what they are doing, such as decision making, particularly with regard to things like administrative law. Decisions made by representative bodies are reviewable in the Federal Court. I know that the administrative arms of representative bodies do commit quite a bit of time and effort into trying to promote educational awareness within governing committees about the Native Title Act and the functions of organisations, but, beyond that, perhaps that is an issue that we can cover in a bit more detail in our submission.

**CHAIR**—Thank you very much for appearing tonight, Mr Sherwin and Mr Stacey. It is very much appreciated. We look forward to seeing you again towards the end of our journey on this topic. I close this public hearing.

**Committee adjourned at 9.54 p.m.**