

Attachment B: AIATSIS Submission to the Native Title Organisations Review

AIATSIS submission to the Native Title Organisations Review

Summary

This submission addresses a number of the issues raised in the Discussion Paper released by Deloitte Access Economics in June 2013 as part of the Review of the roles and functions of native title organisations (NTOs). The organisations under review include Native Title Representative Bodies and Native Title Service Providers (NTRBs/NTSPs) and Prescribed Bodies Corporate, or Registered Native Title Bodies Corporate (referred to here as RNTBCs).

The scope of the Review is wide-ranging, and AIATSIS acknowledges that it is NTOs themselves who are best placed to speak about their circumstances. Indeed, it is our research partnerships with these bodies, and the expertise within them, that informs our research and conclusions. We defer to the submissions of the National Native Title Council (NNTC) and individual NTRBs/NTSPs and RNTBCs as to the operational and policy matters at issue in this review.

This submission addresses those issues under review for which AIATSIS has demonstrated research expertise. To this end, based on current research, the AIATSIS submission pays particular regard to the post determination environment, including the circumstances of RNTBCs, the increasingly diverse demands on NTRB/NTSP services and the ongoing structural competition between resources required for successfully claiming native title and those needed to support the enjoyment of native title. In the main, this submission substantially addresses terms of reference 1, 5, 6 and 9, that is:

1. Examine the range of functions, both statutory and non-statutory currently performed by NTRBs and NTSPs;
5. Consider whether there should be legislative changes to NTRB and NTSP existing powers and functions specifically to include assistance to registered native title bodies corporate (RNTBCs), where appropriate, to attain the capacity to undertake their functions in the best interests of their members and the native title group and in accordance with their legislative and governance requirements (noting that not all RNTBCs require such assistance);
6. Consider the nature of that assistance, canvassing capacity building, and direct or indirect provision of financial, legal and dispute resolution services;
9. Make other incidental recommendations relating to the future role and functions of NTRBs, NTSPs and PBCs to facilitate effective support for native title holders and claimants.

AIATSIS has a long history of research across the broad spectrum of native title law, policy and practice and where possible, this submission will draw on this broad evidence base. We provide additional comments on some other terms of reference.

This submission is based on a primary underlying principle that Indigenous peoples have a right to own and inherit their traditional territories; to make decisions about, and benefit from, their traditional territories and resources; as well as to maintain their culture. Secondly, with the focus of the Review being on NTOs, the observations in this submission are based on the principle that Indigenous peoples should be free to make genuine choices as to how they govern themselves to deliver outcomes in land management, economic development and cultural maintenance. As such, at base, the legislative and regulatory framework should be enabling and not unnecessarily prescriptive.

Attachment B: AIATSIS Submission to the Native Title Organisations Review

The key observation of this submission is that supporting the increasingly diverse roles and functions of native title holders and those of their representative organisations will require increased flexibility in the current system regulating NTOs. This need for flexibility extends to examining existing funding across the native title system. It must be stated that the funding pressures across the NTO sector and the resource intensive processes that still dominate the native title system mean that available options in a budget neutral environment are severely limited.

In response the issues raised in the Discussion Paper, we make the following recommendations:

1. That consideration be given to new funding arrangements for NTRB/NTSPs informed by a comprehensive assessment of current and future workloads to include pre and post determination activities (including future acts).
2. That State and Commonwealth governments enter into settlements in the context of existing claims and claims already resolved to establish a sustainable funding base to support native title governance structures.
3. That State and Commonwealth governments acknowledge, promote and facilitate regional and state wide meetings of RNTBCs as a valuable and appropriate function of NTRB/NTSPs.
4. That opportunities for RNTBCs to meet collectively are leveraged from existing forums (such as NTRB/NTSP annual general meetings, ORIC training or the Native Title Conference) to enable RNTBC networking and information sharing.
5. That the Commonwealth engage in a comprehensive consultations with RNTBCs on any proposed changes to the NTA or policy and funding framework affecting RNTBCs.
6. That RNTBC support services whether for established or establishing RNTBCs, not compete with already limited funding for the resolution of claims.
7. That models for agreed services, roles and accountabilities between RNTBCs and NTRBs/NTSPs be investigated.
8. That direct financial assistance to RNTBCs be based on their capacity to administer funds.
9. That further research be carried out into the support networks and needs of RNTBCs now and in the future.
10. That the Commonwealth consider changes to the NTA that will increase flexibility for the deployment of resources available within the NTO system, including but not limited to:
 - reducing requirements of proof of native title under section 223;
 - reducing the burden of proof by strengthening the presumption of continuity; and
 - reducing the burden of tenure inquiries by strengthening and broadening the provisions disregarding historical extinguishment.
11. That the Commonwealth investigate creating a policy flexible enough to enable greater NTRB/NTSP involvement in post-determination agreements. This should not include a mandatory role for NTRBs where RNTBCs seek to manage these affairs themselves.
12. That private agent lawyers be required to have an objective level of competency. It is recommended that a registration system akin to the certification of Migration Agents be investigated.

Attachment B: AIATSIS Submission to the Native Title Organisations Review

13. That private agents be required to adhere to the same legal obligations and service standards that are imposed on NTRBs/NTSPs. It is recommended that the various State or Territory Law Societies introduce codes of conduct regulating the special ethical considerations applicable in native title matters.
14. That the Commonwealth and key stakeholders engage in consultations to develop strategies aimed at:
 - educating clients on the roles and standards of private agent native title anthropologists; and
 - regulating the quality of anthropological reports for native title claims (eg. mandatory independent peer review) be investigated and implemented.
15. That the Commonwealth and key stakeholders engage in consultations aimed at regulating Indigenous cultural heritage advisors and establishing national standards for qualifications and expertise. In the interim, we recommend that the *Ask First* guidelines be better promoted among native title groups, proponents and heritage advisors.

Attachment B: AIATSIS Submission to the Native Title Organisations Review

1 Context of the Review

1.1 Background to the Review

This submission addresses the terms of reference for the review of Native Title Organisations (the Review) initiated by the former Minister for Housing, Families, Community Services and Indigenous Affairs (FaHCSIA). The Review is being undertaken by Deloitte Access Economics (the Reviewer).

The Review examines the role and statutory functions of NTRBs/NTSPs to establish whether changes are required to ensure that the scope and quality of services to native title holders and claimants are appropriate. In making the recommendations, the Reviewer has been instructed not to assume that there will be additional financial resources available in the system.

The initial terms of reference for the Review (TORs), released in December 2012, state that the Reviewer will:

1. Examine the range of functions, both statutory and non-statutory currently performed by NTRBs and NTSPs;
2. Consider whether NTRBs and NTSPs could adopt a broader role in promoting and facilitating sustainable use of benefits flowing from agreements and settlement of claims;
3. Consider whether there is a continuing need for the recognition provisions in Part 11 of the Native Title Act, noting that 6 of the current 15 native title organisations are NTSPs and therefore outside of the recognition scheme;
4. Examine the scope for rationalisation of the numbers of NTRBs and NTSPs currently operating in the native title system;
5. Consider whether there should be legislative changes to NTRB and NTSP existing powers and functions specifically to include assistance to registered native title bodies corporate (RNTBCs), where appropriate, to attain the capacity to undertake their functions in the best interests of their members and the native title group and in accordance with their legislative and governance requirements (noting that not all RNTBCs require such assistance);
6. Consider the nature of that assistance, canvassing capacity building, and direct or indirect provision of financial, legal and dispute resolution services;
7. Consider the current nature of services to native title holders and claimants by non-NTRB and NTSP based professionals, and the impact on the native title system of these services;
8. Consider whether there should be legislative or regulatory changes to ensure the scope and quality of services to native title holders from non-NTRB and NTSP based professionals are appropriate;
9. Make other incidental recommendations relating to the future role and functions of NTRBs, NTSPs and PBCs to facilitate effective support for native title holders and claimants.

A Discussion Paper on the Review of the Roles and Functions of Native Title Organisations (the Discussion Paper) was released by the Reviewer in early June 2013. This paper includes a number of discussion points broadly relating to NTRB/NTSPs, RNTBCs and private agents.

On 3 August 2013, two recommendations made in the Report of the Working Group on Taxation of Native Title and Traditional Owner Benefits and Governance were also referred to the Review by the

Attachment B: AIATSIS Submission to the Native Title Organisations Review

Minister. These recommendations are that: private agents involved in negotiating native title future act agreements should be regulated (Recommendation 2); and that a statutory trust should be created that would hold native title agreement funds where there is no prescribed body corporate, Indigenous Community Development Corporation entity or other appropriate funds management entity to receive them (Recommendation 3a).

The recognition of native title in Australian law

Understanding how best to support NTOs requires an understanding of how the native title holders, who are their constituents, perceive their purpose and potential. Understanding Aboriginal and Torres Strait Islander peoples' aspirations and purposes for seeking native title recognition and protection is a precursory element the development of reforms to the administration of the native title sector.

Aboriginal and Torres Strait Islander peoples in Australia have asserted their rights to their traditional territories and sought to maintain their connection to their country from the first settlements of Europeans in this continent. While statutory Indigenous land tenures had been progressively recognised in some form in various states through the 1970s and 1980s, a universal form of title, not dependent on a grant from government, was first recognised by the High Court in the case of *Mabo*¹. The decision recognised the pre-existing systems of law and custom of Aboriginal and Torres Strait Islander peoples and found that their rights and interests in relation to their traditional country had survived the acquisition of sovereignty by the British Crown and that these rights and interests would be protected by the common law concept of native title. More specifically, the case recognised that the Meriam people were entitled to possess, occupy, use and enjoy the Murray Islands under their own system of law – against the world. The recognition and protection of native title was heavily qualified by the presumption that the Crown could extinguish native title such that in any conflict between native title and non-indigenous rights and interests, the rights and interests of, or created by, the Crown would prevail.

In response to the *Mabo* decision the Commonwealth introduced a statutory scheme under the *Native Title Act 1993* (Cth) (NTA) that provides the processes for the recognition and protection of native title rights and interests. More specifically the explanatory memoranda of the original NTA and its preamble established the context of the legislation as a tool to:

- provide for the recognition and protection of native title,
- establish ways in which future dealings affecting native title should proceed and the standard for those dealings,
- establish processes for determining native title claims and
- validate past activities that would be otherwise invalidated due to the recognition of native title under *Mabo*.²

The priorities for enacting the NTA were clearly to ensure the orderly and comprehensive determination of where native title exists, and who holds it; and to ensure that Australian government and industry adjusted their behaviours to accommodate these newly recognised legal

¹*Mabo and Others v Queensland* (No. 2)[1992] HCA 23 (3 June 1992).

²NTA s 3.

Attachment B: AIATSIS Submission to the Native Title Organisations Review

rights. The resulting system for establishing native title and managing acts that may affect native title in the future reflects the balance of these interests in complex legal arrangements.

From the outset it was recognised that Aboriginal and Torres Strait Islander peoples would require representation and support to establish their claim to native title. The system of NTRB/NTSPs provides critical advice and assistance in developing applications for determination of native title and compensation settlements, resolving disputes within and between groups and managing future acts and negotiations regarding these acts. NTRBs/NTSPs have emerged from or are embedded in the regional governance structures of Indigenous peoples and they advocate for the recognition and protection of native title and Indigenous peoples interests in their lands more broadly.

This review recognises the need to have a more critical understanding within government of how the roles of NTRBs/NTSPs have and will continue to change.

There was a presumption early on that the native title claims process, and as a consequence the need for NTRBs/NTSPs, had a limited lifespan. The presumption was based on the notion that once native title was determined across the country there would be no need for ongoing support and representation at the regional level; at least not such that would warrant government funding. This presumption has proved demonstrably wrong. There was little understanding at the time of drafting the NTA as to how the rights would be enjoyed by the native title holders. RNTBCs are corporations prescribed under the NTA to hold and/or manage native title. But few have sufficient self-generated resources to operate independently. RNTBCs are therefore interconnected with NTRBs/NTSPs who, continue to support RNTBCs through the negotiation of future acts and ILUAs and compensation claim representation and across an increasingly broad range of activities that support the continued enjoyment of native title.

The roles and functions of RNTBCs and the interdependence of RNTBCs and NTRB/NTSPs is developing as the opportunities and obstacles presented by the recognition of native title become better understood. In the post determination environment, the aspiration of native title is expressed as a form of self-determination and empowerment to enable traditional owners to make decisions about what impacts on their native title lands. However, the many caveats on the enjoyment of native title rights, whether it be in negotiating the interplay of native title with other regulatory frameworks and land interests, or in the mechanisms under the NTA that preference non-indigenous interests seeking access to native title lands, create an ongoing complexity in the post determination environment. While establishing native title may be well understood to be notoriously difficult, 'holding' native title is certainly not a simple thing.

1.2 Current Policy Context

The Discussion Paper of June 2013 outlines the policy context in which this Review was initiated and to a large degree is being undertaken. The change in Federal Government in early September 2013 may result in a new policy and operational framework for NTOs within which recommendations from this Review will be considered. In particular, the new Liberal- National Parties Coalition government has relocated responsibilities for NTOs, along with other Indigenous programs, within the portfolio of the Prime Minister and Cabinet (PM&C) with a dedicated cabinet Minister. In addition, responsibility for the native title system has also been transferred from the Attorney General to the PM&C portfolio. The incoming National Party platform has foreshadowed changes to funding for NTRB/NTSPs and also a review of the native title system and Indigenous corporate

Attachment B: AIATSIS Submission to the Native Title Organisations Review

governance more broadly.³ The Coalition has indicated a fundamental commitment to Indigenous peoples being able to make decisions about the use of their land for economic development and cultural support.

Native title and closing the gap

In the Discussion Paper, the Reviewer acknowledges that current reforms to the native title system are occurring within the broader context of the Council of Australian Governments (COAG) 'Closing the Gap' framework.⁴ This framework seeks to address the disparities between Indigenous and non-Indigenous health, education, housing, economic participation, engagement in justice and governance through a range of policy measures.⁵ Federal Government spending investment for Closing the Gap has been focused on health services and programs to support Indigenous participation in the mainstream economy.⁶

It is acknowledged that the Closing the Gap framework coincides with broader recognition of the place of Aboriginal and Torres Strait Islander peoples in Australia's national polity and constitutional framework.⁷ Likewise there has been a developing body of research into the need to facilitate access to country as a way of affirming Indigenous culture and improving the health and wellbeing of Aboriginal and Torres Strait Islander people.⁸ The former Labor government recognised that native title is critical to economic development and Closing the Gap policy initiatives aimed at addressing

³See National Party, *Policy Platform* (23 September 2013), 53 <http://www.nationals.org.au/Portals/0/2013/policy/Policy_Platform_August2013.pdf> accessed >.

⁴Deloitte Access Economics, 'Review of the Roles and Functions of Native Title Organisations' (Discussion Paper Deloitte prepared by, June 2013) 3. The Closing the Gap initiative was announced in 2008 as a broad-scale policy strategy aimed at addressing Indigenous disadvantage in response to a recommendation made in the 2005 Social Justice Report. Closing the Gap targets are predominantly focused on health and education indicators, but include improving employment outcomes for Indigenous people. The approach focuses on six 'building blocks': early childhood; schooling; health; economic participation; healthy homes; safe communities; and governance and leadership. Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA) website, 'Closing the gap', <http://www.fahcsia.gov.au/our-responsibilities/indigenous-australians/programs-services/closing-the-gap>, accessed 31 July 2013.

⁵Housing Department of Families, Community Services and Indigenous Affairs, *Closing the Gap: Targets and building blocks* (10 August 2012) <<http://www.fahcsia.gov.au/our-responsibilities/indigenous-australians/programs-services/closing-the-gap/closing-the-gap-targets-and-building-blocks>>.

⁶Steering Committee for the Review of Government Service Provision (SCRGSP), '2012 Indigenous Expenditure Report' (Report Productivity Commission, 2012).

⁷This recognition includes the establishment of the Expert Panel on Constitutional recognition: Australian Institute of Aboriginal and Torres Strait Islander Studies, 'Submission to the Expert Panel on the Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples' (Submission made by the Australian Institute of Aboriginal and Torres Strait Islander Studies, 4 October 2011).

⁸See Helen L. Berry et al, 'Mind, body, spirit: co-benefits for mental health from climate change adaptation and caring for country in remote Aboriginal Australian communities' (Pt 6) (2010) 21 *New South Wales Public Health Bulletin* 139; Cynthia Ganesharajah, 'Indigenous Health and Wellbeing: The Importance of Country' (Native Title Research Report 1/2009 AIATSIS, 2009). In policy contexts see for example: Queensland Government, 'Queensland Closing the Gap Report: 2008/09 Indicators and Initiatives for Aboriginal and Torres Strait Islander Peoples' (Report prepared by Department of Aboriginal and Torres Strait Islander and Multicultural Affairs, 2009) <<http://www.datsima.qld.gov.au/resources/atsis/government/programs-initiatives/closing-gap/2008-09-annual-report/ctg-0809-land-culture.pdf>>.

Attachment B: AIATSIS Submission to the Native Title Organisations Review

Indigenous disadvantage.⁹ However, an inadequate statutory framework, weak accountability arrangements and insufficient funding for NTRBs/NTSPs and RNTBCs were identified as impediments to realising Closing the Gap outcomes.¹⁰

Despite the recognition of the connection between country and wellbeing, there is limited political recognition of the benefit of native title to the economy and to Aboriginal and Torres Strait Islander peoples economic wellbeing. Establishing a regime of native title rights that are clear, strong and economically valuable; can, in turn, provide a resource base for Indigenous social and economic development.¹¹

Native title is central to economic participation where there is Indigenous control over land.¹² Indigenous control over native title land is partially determined by the provisions of the NTA as well as the way in which government approaches determined native title rights and interests. Importantly, this requires treating native title as a valuable form of property with similar freedoms and protections to other forms of property.

The current focus of the native title system is the resolution of claims or securing outcomes through agreement making, which is driven by non-indigenous interests.¹³ Our research suggests that agreement making is not the central focus of native title holders. Rather, the aspirations of native title holders are consistent with more holistic approaches to managing community and country that aligns with community priorities and aspirations. The broader aspirations of RNTBCs fall within a concept of self determination in terms of achieving and developing independence, actively making decisions about the management of country and achieving economic and cultural outcomes for their communities.¹⁴

⁹Native title also featured in FaHCSIA's *Indigenous economic development strategy 2011–2018*, http://www.fahcsia.gov.au/sites/default/files/documents/09_2012/ieds_2011_2018.pdf, accessed 22 August 2013.

¹⁰Jenny Macklin, *Beyond Mabo: native title and closing the gap*, Mabo Lecture presented at James Cook University, Townsville, 21 May 2008, <http://www.nswbar.asn.au/circulars/macklin.pdf>, accessed 30 July 2013.

¹¹For a general overview on the Closing the Gap program see: Commonwealth of Australia, 'Closing the Gap: Prime Minister's Report 2012' (Prime Minister's Report Commonwealth of Australia, February 2012).

¹²Commonwealth of Australia, 'Overcoming Indigenous Disadvantage Key Indicators 2011' (Report prepared by Steering Committee for the Review of Government Service Provision, 2011).

¹³For a comprehensive discussion see Lisa Strelein and Christine Regan, 'Native Title organisations: an overview of roles, resourcing and interrelationships in the post-determination context' (Research Discussion Paper AIATSIS, forthcoming). The focus of the system as understood by the reviewers is the timely resolution of claims' and 'high quality agreement making': Deloitte Access Economics, 'Review of the Roles and Functions of Native Title Organisations' (Discussion Paper Deloitte prepared by, June 2013), 3.

¹⁴For discussion of self-determination and its iterations as form of sovereignty in popular, legal and political senses see: Sean Brennan, Brenda Gunn and George Williams, "'Sovereignty" and its relevance to treaty-making between Indigenous peoples and Australian Governments' (2004) 26(3) *The Sydney Law Review* 307. Brennan et al argue that sovereignty is not purely about the about external sovereignty to deal with nation states but is related to the ability to influence institutions.

Attachment B: AIATSIS Submission to the Native Title Organisations Review

1.3 Background to AIATSIS

The Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) established the Native Title Research Unit (NTRU) shortly after the *Mabo* decision in 1992, in partnership with the Commonwealth government (then the Aboriginal and Torres Strait Islander Commission) and the emerging NTO sector. The NTRU undertakes legal and social research activities across a range of thematic areas, many of which have produced findings that are directly relevant to the central concerns raised by the Review's TORs.

Since 2006, the NTRU has led national research focused on developing a knowledge base about the aspirations and capacities of native title holders to manage their land and waters after a determination of native title has been made.¹⁵ The NTRU's research in this area has been grounded in collaborations with NTRBs/NTSPs, RNTBCs and policy and decision makers. Aspects of this research have included:

- National forums and workshops that bring together RNTBCs and relevant Federal government agencies
- Regional and state and territory workshops that encourage engagement between State government land managers and traditional owners
- In depth case study analysis carried out in north Queensland, Western Australia, Central Australia and the Torres Strait with RNTBCs¹⁶
- A comprehensive survey on the needs and aspirations of RNTBCs¹⁷
- An examination of two land use planning and management regimes in which native title currently interacts¹⁸

This research has revealed that there are still strong ideological and practical impediments to the enjoyment of native title once recognised, including the failure of state legislative regimes to accommodate and adapt to the recognition of native title.

2 Native title representative bodies and native title service providers

2.1 The range of functions, both statutory and non-statutory currently performed by NTRBs and NTSPs

The NTA broadly governs the functions of NTRBs/NTSPs and RNTBCs. The statutory functions of NTRBs/NTSPs are outlined in section 203FE of the NTA. Other NTRB/NTSP functions include:

- Facilitation and assistance functions (s 203BB);

¹⁵In 2007 AIATSIS received funding support from the then Department of Families, Community Services and Indigenous Affairs (FaCSIA) (now FaHCSIA) to convene the first national meeting of RNTBCs.

¹⁶Toni Bauman, Lisa Strelein and Jessica Weir (eds), *Living with native title* (forthcoming)

¹⁷See Appendix A for further details on survey methodology.

¹⁸Nick Duff, 'Managing Weeds on Native Title Lands' (Workshop Report Australian Institute of Aboriginal and Torres Strait Islander Studies, December 2011); Tran Tran et al, 'Native Title and Climate Change: Changes to country and culture, changes to climate: Strengthening institutions for Indigenous resilience and adaptation' (Final Report National Climate Change Adaptation Research Facility, 2013).

Attachment B: AIATSIS Submission to the Native Title Organisations Review

- Certification functions (s 203BE);
- Dispute resolution functions (s 203BF);
- Notification functions (s 203BG);
- Agreement-making functions (s 203BH);
- Internal review functions (s 203BI); and
- Other functions (s 203BJ and s 203 AI).

There is no express function for NTRBs/NTSPs specifically related to assisting RNTBCs in the management and enjoyment of native title rights and interests or the implementation of agreements. However, irrespective of the how NTRB functions are prioritised or resources are allocated, a representative body must 'give priority to the protection of the interests of native title holders'.¹⁹

As noted above in section 1.1, the diversity of the native title sector is a critical element and driver of the Review.²⁰ While NTRB/NTSPs have enjoyed a relatively stable period over the past five years, the Discussion Paper rightly identifies a shift in the demands on NTRB/NTSPs from recognition to other assistance related to holding and managing native title, including implementing agreements.

As of 31 August 2013, there have been a total of 240 native title determinations. The vast majority of these have been claimant determinations, which have resulted in a positive finding that native title exists in whole or parts of the determination area.²¹ The emphasis of the NTA is to maximise outcomes through non-adversarial and collaborative alternative dispute resolution mechanisms such as mediation and facilitation. As such, to date, 176 native title determinations have been decided by consent, 28 by litigation, with the remainder being unopposed determinations.²² Compared to other types of claims, native title determination work constitutes the vast majority of NTRB/NTSP activities.

This situation contrasts with the need for developing and prosecuting compensation claims which remains a latent burden. While native title groups are now beginning to pursue compensation claims, compensation remains a relatively uncharted area for native title law. There are currently six active compensation applications.²³

Ongoing claims work competes with post determination demands. There are currently over 100 RNTBCs across Australia and this number is set to increase as more native title determinations are achieved.²⁴ The average time of incorporation of RNTBCs is 7.4 years increasing demand for support

¹⁹NTA, s 203B(4).

²⁰Deloitte Access Economics, 'Review of the Roles and Functions of Native Title Organisations' (Discussion Paper Deloitte prepared by, June 2013) 1-2.

²¹197 were claimant determinations with 188 of those claims resulting in a positive determination.

²²The majority of determinations that native title does not exist are unopposed and are a direct result of the requirement under the *Aboriginal Land Rights Act 1983* (NSW) that any claim to land under this Act is subject to a determination that native title does not exist.

²³There has only been one litigated compensation determination, which was ultimately unsuccessful, and one successful compensation settlement. However some ILUAs have been considered to be compensation settlements. See further: Government of Western Australia, Yawuru Agreements (23 September 2013) <<http://www.dpc.wa.gov.au/lantu/Agreements/YawuruAgreements/Pages/Default.aspx>>.

²⁴Aboriginal Torres Strait Islander Studies Australian Institute of, 'Registered Native Title Bodies Corporate (RNTBC) and Prescribed Bodies Corporate (PBC) Summary' (Summary prepared by the Native Title Research Unit, 27 June 2013) <<http://www.aiatsis.gov.au/ntru/docs/resources/issues/RNTBCsummary.pdf>>.

Attachment B: AIATSIS Submission to the Native Title Organisations Review

to realise broader native title aspirations.²⁵ RNTBCs hold formal land management and community development responsibilities over their native title lands which collectively comprise over 20 per cent of the Australian continent.²⁶

The distribution of the native title estate is not even across the country. Successful determinations of native title are clustered in particular regions, including the Torres Strait, Central Desert, Carpentaria and the Kimberley, with increasing numbers of determinations more recently in North and Far North Queensland and South Australia. Some regions have most of their applications for determination still outstanding, including Southern Queensland, New South Wales, and the Goldfields. Almost all NTRBs/NTSPs have at least some outstanding claims, including over sea country.²⁷

As 27 September 2013, there were 424 active claimant applications for a determination of native title in the system. Even though the number of potential applications is ostensibly finite, the eventual number of claims is not yet clear. On current disposition rates, it is estimated that the work of NTRBs/NTSPs in ensuring the recognition of native title could continue for a further 37 years.²⁸ Again, however, the claims load varies significantly from region to region.

Enormous diversity also exists in the demands of external parties for access to native title lands and the consequential workloads in managing future act notifications and negotiations. As at 16 September 2013, there were a total of 791 Indigenous Land Use Agreements (ILUAs) registered in Australia. ILUAs cover a number of topic areas. From the recorded topic areas, 37 per cent of all ILUAs related to access, 17 per cent, mining, 16 per cent infrastructure, 14 per cent development, 10 per cent pastoral areas, 7 per cent, pipeline and 6 per cent co-management and 5 per cent consultation protocols.

²⁵ Aboriginal Torres Strait Islander Studies Australian Institute of, 'Preliminary demographic analysis of PBC Directores: a basis for assessing demographic trends and implications for PBC governance' (Unpublished draft prepared by Geoff Buchanan Native Title Research Unit, May 2013). This data relates to the date of incorporation rather than the date of registration as an RNTBC. For commentary on aspirations see: Tran Tran, Claire Stacey and Pamela McGrath, 'Background Report on Prescribed Bodies Corporate Aspirations' (Report to Deloitte Access Economics for the FaHCSIA Review of Native Title Organisations, April 2013).

²⁶ As at June 2013 the area of land with a positive native title determination and a RNTBC in place is 1 397 000 square kilometres, or approximately 18 per cent of Australia's land mass. There were also thirty-two determinations for which RNTBCs were yet to be advised, giving rise to an area covered by determinations of 1,592,340 square kilometres, equivalent to approximately 20.7 per cent of Australian land mass: National native Title Tribunal, *Determinations of Native Title* (30 June 2013) <http://www.nntt.gov.au/Mediation-and-agreement-making-services/Documents/Quarterly%20Maps/Determinations_map.pdf>.

²⁷ National Native Title Tribunal, *Claimant Applications as per the Register of Native Title Claims* (30 June 2013) <http://www.nntt.gov.au/Mediation-and-agreement-making-services/Documents/Quarterly%20Maps/RNTC_map.pdf>.

²⁸ As at 27 September 2013, there were 424 active claimant applications registered with the NNTT. Based on the number of claims prosecuted over the past 20 years, since the enactment of the NTA, it would take approximately 35 years to settle the outstanding native title claims. However, this figure may be somewhat misleading in that 'the pioneering phase of native title claims, from 1994 through to 2002, involved extensive, intensive and expensive litigation in order to settle many of the rules governing native title'. Much of the rules governing native title are now largely settled. Nonetheless 'negotiated, consent determinations of native title, to achieve both native title and non-native title outcomes, should now be seen, not merely as the preferred or ideal way to resolve native title claims, but the usual way'. Moreover, state governments are beginning to look to more innovative case management that promotes the speedier resolution of outstanding claims, such as the Victorian Alternative Settlement Framework.

Attachment B: AIATSIS Submission to the Native Title Organisations Review

Recent research by AIATSIS suggests that future act management and negotiations for land access currently dominates the work of many RNTBCs.²⁹ Such development-driven activities utilise scarce human and financial resources that might otherwise be put to work supporting other aspirations, such as tourism, business development, financial investment, agriculture, aquaculture or commercial fishing and land and sea management.³⁰ This is particularly the case in mining regions.³¹ Broader aspirations should be considered in the context of any reforms to resourcing and administration of the native title regime.

Future trends for NTRB/NTSP activity

As native title is the recognition of traditionally-derived authority to exercise rights and interests in land, the aspirations of native title holders understandably include a desire to independently exercise this authority in a range of contemporary contexts.³² Achieving respect for Indigenous authority and independence is an aim articulated by both NTRBs/NTSPs and RNTBCs.³³ This common

²⁹ Between March and August 2013, AIATSIS ran a nation-wide survey of RNTBCs (the AIATSIS 2013 PBC Survey) to establish the extent to which RNTBCs are able to meet corporate obligations and pursue aspirations under currently funding and governance arrangements. At the time of writing, results from this survey had not yet been published, but initial analysis has begun. A representative sample of 27 RNTBCs responded to the AIATSIS 2013 PBC survey. The number and location of respondents was comparable to the national distribution of RNTBCs by State/Territory location, with the notable exception of the Northern Territory where no PBCs have yet responded to the survey. The sample is also fairly representative of the national distribution by size of organisation as classified under the CATSI Act. See Appendix A for further details on survey methodology. Preliminary analysis of RNTBC responses suggests that the administration of future act notifications, supporting cultural activities, and undertaking heritage management are currently the main activities undertaken by RNTBCs. Undertaking additional native title claims and land and sea management are also important current activities. The next most reported activity was management of future acts negotiations (11 (41 per cent)). Post determination activities contributed to the main activities of PBCs receiving 18 (67 per cent) responses and claims work receiving 14 (52 per cent) responses.

³⁰ When asked what activities they would like to do in the future (but were currently unable to), most respondents identified commercial enterprises such as tourism (17 (63 per cent)), business development or financial investment (14 (52 per cent)), and agriculture, aquaculture or commercial fishing (13 (48 per cent)). The second most common response was land and sea management (15 (56 per cent)).

³¹ Joint Statutory Committee on Native Title and the Aboriginal and Torres Strait Islander Land Account, Perth, *Official Committee Hansard: Native Title Representative Bodies* 19 July 2005 (Alan John Layton, Research and Policy Officer, Association of Mining and Exploration Companies).

³² Australian Institute of Aboriginal and Torres Strait Islander Studies, 'Prescribed Bodies Corporate Aspirations' (Background Report prepared by Dr Tran Tran, Claire Stacey and Dr Pamela McGrath Native Title Research Unit, April 2013) The House Standing Committee on Aboriginal and Torres Strait Islander Affairs has noted that 'sovereignty is about Indigenous people having the power to exercise real control over decision-making that affects their daily lives': House Standing Committee on Aboriginal and Torres Strait Islander Affairs, House of Representatives, Canberra, *Many Ways Forward: Report of the inquiry into capacity building and service delivery in Indigenous Communities* (2004), [4.24].

³³ These aspirations have been expressed in the following terms in corporate publications of various native title organisations: 'to advance the self-determination of Aboriginal people of the Cape York Peninsula' and 'to help our people realise self determination' (Cape York Land Council (CYLC), *Annual Report* (2012), 6, 20; 'realizing Traditional Owner's aspirations to land and waters through professional native title services' (Queensland South Native Title Services, *Annual Report* (2012), 14; '[that] Aboriginal people benefit economically, socially and culturally from the secure possession of their traditional lands and waters' (North Queensland Land Council (NQLC), 'Annual Report' (2012), 22; 'Empowering our people to contribute to and make decisions

Attachment B: AIATSIS Submission to the Native Title Organisations Review

purpose and aspiration creates impetus for collaboration, sharing of knowledge and experience across regions and underpins informal forums such as the NTRB/NTSP CEO and Senior Professional Officers Forum, the national native title conference and more formalised representation as expressed in the formation of the National Native Title Council (NNTC). These regional and national forums also have a specific function in coordinating input and responses to development and reform in the native title sector. The ability of native title holders, RNTBCs and NTRBs/NTSPs to have regular forums to articulate their perspectives and interact with policy is a critical element of ensuring the effective operation of the system.

NTRBs/NTSPs and RNTBCs also face additional internal challenges that are specific to the sector. Intra-group disputes (or disputes about the composition of particular groups) and community conflict is an inherent element of the native title sector. It does not necessarily end when a determination has been made. RNTBCs also have the task of determining who the determined native title holders are. In many instances, NTRBs/NTSPs need capacity and scope to assist RNTBCs and potential common law native title holders to work through these conflicts as a part of their legislative functions.³⁴

In some cases personal or political differences between native title holders and their regional NTRBs/NTSPs exist; in others, RNTBCs simply desire to be self-sufficient and operate independently. As a result, some RNTBCs prefer not to have an ongoing relationship with their NTRB/NTSP post-determination.³⁵ However, complete independence is the exception. Generally, the question arises as to what kind of support is needed and the extent to which the NTRBs/NTSPs can provide support on an ongoing basis.

regarding their future, ensures that our culture will remain strong and that the future will be guided by the people who live in the region'(Torres Strait Regional Authority (TSRA), *Annual Report* (2012), iii ; 'leader of sustainable indigenous economic development in the lower gulf region where our people are self determined and empowered to take control of our country our culture and our future.': Carpentaria Land Council Aboriginal Corporation (CLCAC), *About us* <<http://www.clcac.com.au/about-us>>; 'to achieve social justice and economic, cultural and social independence for Aboriginal communities through assisting Traditional Owners of lands, seas and water': NTSCorp, *Annual Report* (2012), 5 ; 'traditional owners participate fully in the social, cultural and economic life of Victoria supported by active sustainable traditional owners organisations': Native Title Services Victoria (NTSV), 'Annual Report' (2012), 13; 'to enhance our clients' capacity to achieve their aspirations on their terms' South Australia Native Title Services (SANTS), *SANTS Annual Report 2012* (2012), 9; 'to secure the rights and interests of Kimberley Traditional Owners in relation to their land and waters and to protect their significant places' Kimberley Land Council (KLC), *Annual Report 2012* (2012), 4; 'To work with Yamatji and Pilbara Aboriginal people to pursue: recognition and acceptance of Yamatji and Pilbara culture in Country and a strong future for Yamatji and Pilbara people and Country: Yamatji Marlpa Aboriginal Corporation, *Annual Report 2012* (2012); to achieve enhanced social, political and economic participation and equity for Aboriginal people in its jurisdiction as a result of the promotion, protection and advancements of their land rights, other rights and interests: Northern Land Council (NLC), *Annual Report 2011-2012: Our Land, Our Sea, Our Life* (2012), 2; ' to progress resolution of the Noongar native title claims, while also advancing and strengthening Noongar culture, language, heritage and society': South Western Aboriginal Land and Sea Council (SWALSC), *Home* <<http://www.noongar.org.au/>>; 'serving Central Australian constituents...[in] rights, land access, cultural protection, sustainable economic use of Aboriginal land and building stronger communities': Central Land Council (CLC), *Strategic Plan* (2012) <http://www.clc.org.au/files/pdf/Strategic_Plan_2012-17_.pdf>.

³⁴Sarah Burnside, 'Outcomes for all? Overlapping claims and intra-indigenous conflict under the NTA' (2012) 16(1) *Australian Indigenous Law Review* 2.

³⁵Toni Bauman, 'Final Report of the Indigenous Facilitation and Mediation Project July 2003-June 2006: research findings, recommendations and implementation' (Report No 6, Australian Institute of Aboriginal and Torres Strait Islander Studies, 2006).

Attachment B: AIATSIS Submission to the Native Title Organisations Review

Impact of historical accountabilities and funding rules

Understanding the current roles and functions of, and expectations and constraints upon, NTRBs/NTSPs requires an understanding of the historical circumstances from which particular organisations have emerged and historical changes to the way in which they have been funded. Current statutory and funding arrangements for NTRBs reflect the expectations placed on NTRBs by the Commonwealth, which are geared towards efficient client services in the finalisation of native title applications. As outlined in the Deloitte discussion paper, the functions of NTRB/NTSPs under the NTA are further modified by conditions imposed on funding known as Program Funding Agreements (PFAs) between the Commonwealth and NTRBs/NTSPs. However, NTRBs/NTSPs are also responsive, and in some instances responsible, to their constituents and clients beyond what is provided under the PFAs. These responsibilities are derived from the historical community basis of many NTRBs and the current needs of their clients/constituents for support and representation in relation to the management of native title lands.³⁶ This dual accountability, to constituents and to the funding body has often caused tension for NTRB/NTSPs.

We note that NTRBs/NTSPs operate within complex funding environments and have diversified funding sources to carry out a range of native title and non-native title activities. The degree of connection between native title funding and non-claim activity is directly linked to the requirements under s 203FE of the NTA and PFAs (as noted above).

When providing post-determination support to native title holders NTRBs rely on existing corporate knowledge and procedures as well as longstanding organisational relationships between NTRBs/NTSPs and native title claimants and holders in order to maximise efficiencies and outcomes. Managing limited staff resources in such a way that there is continuity between the pre-and post-determination phases of a group's native title journey makes a lot of sense, particularly given the crucial role of relationships of trust between support staff and the native title group to facilitating sustainable governance outcomes.³⁷ In the post-determination phase, these activities invariably extend beyond the activities for which NTRBs/NTSPs have previously been geared toward, to include activities such as land management, community development, the distribution of benefits and facilitating research partnerships. And yet NTRBs/NTSPs are required to separately account for staff time and resources in meticulous detail according to PFA and non PFA funded activities in order to meet reporting requirements. Over reporting is often replicated across disparate sources of funding. Multiple funding sources have led some NTRB/NTSPs to establish clear organisational divisions for

³⁶There are currently 17 recognised representative Aboriginal/Torres Strait Islander Body Areas represented by 15 organisations funded to perform native title functions. Six out of 15 representative organisations are funded under s 203FE(1) of the NTA to perform functions for specific areas. These bodies are Central Desert Native Title Services, South Australian Native title Services, Carpentaria Land Council Aboriginal Corporation, Queensland South Native Title Services (since 2005 and amalgamated with other representative bodies in 2008) and NTSCorp and Native title Services Victoria. Sanders argues that many Indigenous corporations formed during the 1970s represent actions of self-determination: Will Sanders, 'Towards an Indigenous order of Australian government: Rethinking self-determination as Indigenous affairs policy,' (CAEPR Discussion Paper No 2002) <http://caepr.anu.edu.au/sites/default/files/Publications/DP/2002_DP230.pdf>.

³⁷An ability to understand Indigenous contexts and build trust and confidence through small steps is a key factor for building mutual organisational capacity and good governance: Travers H, Tsey K, Gibson T, Whiteside M, CadetJames Y, Haswell-Elkins M 'The role of empowerment through life skills development in building comprehensive primary health care systems in Indigenous Australia' (2005) 11(2) *Australian Journal of Primary Health* 16.

Attachment B: AIATSIS Submission to the Native Title Organisations Review

particular classes of activity, such a claims management, future acts and land and sea management.³⁸

Up until September 2013, all income raised by an NTRB/NTSP was subject to audit by FaHCSIA. Prior to September 2011 the PFA distinguished between activity generated and non-activity generated income. In essence activity generated income was the income earned by the funded body through the use of funded assets or resources (such as staff or vehicles). This situation would occur for example where a mining company or developer contributes to the cost of meetings (through paying for venue, travel or staff time) to assist with claim group meetings. Non-activity generated income was income earned where funded resources were not used.

The capacity of NTRBs/NTSPs to generate income to assist with other non-funded functions (for example, assisting RNTBCs) was an essential part of its overall capacity. The 2011 changes to the PFA has removed that distinction and all income earned is considered part of the overall budget of the NTRB. FaHCSIA has inserted into the PFA the right to approve or deny the roll-over of funds from one year to the next, thus potentially denying NTRBs the use of non-activity funding for non-funded activities. Further, these new requirements hamper the innovation of NTRBs/ NTSPs in attracting additional funds to support their clients/constituents in achieving broader aspirations that are not identified as strictly native title work.

Many NTRBs/NTSPs manage programs that are not directly connected to claiming native title, but are central to supporting the enjoyment of native title, such as ranger programs and land and sea management programs. Some of these activities are separately funded through, for example, the Caring for Our Country programs and do not necessarily impact on the service delivery of NTRBs in fulfilling their PFA.

There may be instances, however, where it makes sense for staff or resources nominally funded by FaHCSIA to be allocated to other activities, resulting in greater efficiencies in terms of both time and costs. For example, an NTRB funded native title claim group meeting might also be an opportunity for the NTRB and native title group to discuss and action a range of other issues related to the management of native title lands. These decisions might relate to matters such as fire management regimes, development proposals or engagement with various government agencies. The ability to carry out the business of the native title claim group in such a way is critical in remote areas where traditional owners are expected to travel extensively in order to meet. Ideally funding arrangements for NTRBs would be sufficiently flexible so as to allow for allocation of precious financial and human resources to a variety of native title related activities beyond those prescribed.

Legislative and funding mechanisms have been slow in responding to the expanding roles of NTRBs/NTSPs, limiting the ability of these organisations to respond appropriately and efficiently to the needs of the sector.³⁹Strelein notes that 'although it is clear that NTRBs need to be funded to achieve a broad range of outcomes for native title applicants, the Government's approach to funding has in effect curtailed the role of NTRBs to focusing on claims resolution'.⁴⁰This was also a key

³⁸This has been noted specifically by the Kimberley Land Council in its annual report: Kimberley Land Council, *Annual Report 2012* (2012).

³⁹The federal government has only provided support to native title holders since 2006, 14 years after the establishment of the system. This support has taken the form of in-kind support to RNTBCs to a brokerage role whereby, NTRBs apply for funding from FaHCSIA on behalf of RNTBCs. This is discussed further in section 4 below.

⁴⁰Lisa Strelein and Christine Regan, 'Native Title organisations: an overview of roles, resourcing and interrelationships in the post-determination context' (Research Discussion Paper AIATSIS, forthcoming) 8.

Attachment B: AIATSIS Submission to the Native Title Organisations Review

message from the 2004 review of NTRBs,⁴¹ and is supported by research conducted by the Australian National Audit Office (ANAO) which indicates that inflexibility of multiple funding arrangements hampers the efficiency of many Indigenous organisations.⁴² We submit that the reporting and management requirements imposed on NTOs under various funding and statutory arrangements should recognise the need for flexibility in arrangements for expenditure and reporting.

Funding policies can undermine the interests of the clients NTRBs/NTSPs represent. For example, Strelein has noted the fact that through the Commonwealth funding rules NTRBs/NTSPs have been generally unable to 'simultaneously conduct the interrelated processes of agreement-making and litigation, where this would have been the most effective strategy to further the interests of traditional owners'.⁴³ NTRBs/NTSP activity will be fundamentally shaped by legal strategy and policy decisions about whether to pursue recognition via negotiation or litigation. This decision does not always belong to the NTRB/NTSP and will to an extent be influenced by the strategies of respondent parties, primarily state governments and the directions of the Federal Court. Up until September 2013 funding rules treat litigation as an exception and NTRB/NTSPs can only use Commonwealth funding to engage in litigation with approval from FaHCSIA. These rules are particularly strict if access to additional strategic litigation funding is required.⁴⁴ These arrangements further impact on NTRB/NTSP priorities.

The implications of chronic underfunding

There is considerable evidence that NTRBs/NTSPs have been consistently underfunded relative to their mandated workloads and over the years, NTRBs/NTSPs have increasingly been asked to do more with less.⁴⁵ Although the 1998 amendments to the NTA required that representative bodies demonstrate they are effective, efficient and responsive as service delivery agencies, a review commissioned by Aboriginal and Torres Strait Islander Commission (ATSIC) coinciding with these reforms concluded that the workloads of NTRBs was greater than the funding actually provided.⁴⁶ The ATSIC review found that in such circumstances NTRBs were unable to fulfil core functions or

⁴¹Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Account, Canberra, *Native Title Representative Bodies* (2004)

See also Australian Government Commonwealth Grants Commission, 'Indigenous Funding Inquiry' (Final Report Commonwealth Grants Commission, March 2001) <<http://www.cgc.gov.au/index.php/inquiries/other-inquiries/53-2001-indigenous-funding-inquiry>>.

⁴²Australian National Audit Office, 'Capacity Development for Indigenous Service Delivery' (Audit Report No 26, Australian National Audit Office, February 2012).

⁴³Lisa Strelein and Christine Regan, 'Native Title organisations: an overview of roles, resourcing and interrelationships in the post-determination context' (Research Discussion Paper AIATSIS, forthcoming). In parliamentary debates it was also noted that reforms should be consistent with the aspirations of traditional owners otherwise 'a future government will be confronted with an even more complex and demanding task in forming and enacting legislation to address the resulting legal chaos, social division, and economic loss' Native Title Amendment Bill 1997 [No.2] Second Reading, 3 April 1997, 1956.

⁴⁴Australian Government, 'Guidelines for Contested Native Title Litigation, 2013-2014 to 2014-2015' (Guidelines Department of Families, Housing, Community Services and Indigenous Affairs, 1 July 2013) <http://www.nativetitle.org.au/documents/FaHCSIA_ContestedLitigationGuidelines2013-15.PDF>.

⁴⁵Lisa Strelein and Christine Regan, 'Native Title organisations: an overview of roles, resourcing and interrelationships in the post-determination context' (Research Discussion Paper AIATSIS, forthcoming).

⁴⁶ *Ibid.*

Attachment B: AIATSIS Submission to the Native Title Organisations Review

maintain appropriate corporate governance structures. Moreover, the review found that the cumulative impact of underfunding has considerable costs for the community.⁴⁷ These concerns were reiterated during a 2001 Parliamentary Joint Committee hearing into ILUAs.⁴⁸ A much needed increase in funds in the 2009-10 budget provided respite to the NTRB/NTSP system.⁴⁹ However, the necessity of claims prioritisation continue to create potential to damage relationships between the NTRB/NTSP and elements of their constituency, where claims cannot progress as claim groups desire or expect.

Until 2007 The NTRBs/NTSPs were not funded to assist RNTBCs beyond the first year of operation.⁵⁰ Similarly the RNTBCs were not funded directly to obtain their own advice and assistance. Many NTRBs/NTSPs are moving towards the support of RNTBCs through providing meeting assistance, corporate and strategic development and facilitating training opportunities. These functions are broader than merely assistance with corporate compliance required by the Office of the Registrar of Indigenous Corporations (ORIC) or legal advice with respect to ILUAs and future acts. However the funding and support available to RNTBCs is grossly inadequate. As a result, we are seeing similar, but even more dramatic impacts from under-resourcing in the RNTBC sector, including the capacity for effective governance and decision-making, meeting expectations of constituents and communicating effectively.

RNTBCs face challenges in balancing broad ranging aspirations and expectations from their communities, amidst the complex statutory responsibilities. It has long been recognised that funding for RNTBCs fall within a jurisdictional gap between federal and state governments. That is, the states argue that RNTBC funding is the responsibility of the Commonwealth as they are prescribed under federal legislation in the NTA, whereas, the Commonwealth argued that RNTBCs were part of the land and water management sector and as such are a state government responsibility.⁵¹ We submit however, that responsibility to engage with native title holders on their broader aspirations falls to both state or territory and federal governments. The limited policy development with respect to RNTBCs has led to greater complexity in the management of native title lands, impacting upon both RNTBCs and NTRBs/NTSPs.

The evidence suggests that far from decreasing overtime, the roles and expectations of NTRBs/NTSPs are, in fact, growing and expanding. NTRBs/NTSPs are expected to continue to resolve

⁴⁷ Anthropos Consulting, Ebsworth & Ebsworth and Senatore Brennan Rashid, 'Research Project into the issue of Funding of Registered Native Title Bodies Corporate' (Research report prepared for the Aboriginal & Torres Strait Islander Commission, October 2002).

⁴⁸ Joint Committee On Native Title and the Aboriginal and Torres Strait Islander Land Fund, Joint Committee, Nineteenth Report: Second Interim Report for the s.206(d) Inquiry - Indigenous Land Use Agreements (2001).

⁴⁹ Attorney General's Department 'Closing the Gap - Funding For the Native Title System (Additional Funding and Lapsing)' Budget 2009-10 Fact sheet, <<http://www.ag.gov.au/Publications/Budgets/Budget2009-10/Pages/ClosingtheGapFundingFortheNativeTitleSystemAdditionalFundingandLapsing.aspx>>

⁵⁰ In 2007 the then Department of Family and Community Services and Indigenous Affairs (FaCSIA) released its 'Guidelines for basic support funding for Prescribed Bodies Corporate (PBCs)' inviting applications from RNTBCs and requiring an NTRB or NTSP to also administer the funding. In the 2011–12 financial year, FaHCSIA provided almost \$1.7 million to NTRBs and NTSPs to provide basic support to RNTBCs and some PBCs. This constitutes approximately two per cent of the total funding provided to NTRBs and NTSPs. See Australian Government, 'Basic Support Funding for Prescribed Bodies Corporate' (Guidelines Department of Families, Housing, Community Services and Indigenous Affairs, February 2011) <<http://www.aiatsis.gov.au/ntru/docs/resources/rntbc/toolkits2011/FaHCSIAguidelines.pdf>>.

⁵¹ Lisa Strelein and Tran Tran, 'Building Indigenous Governance from Native Title: Moving away from 'Fitting in' to Creating a Decolonised space' (2013) 18(1) Review of Constitutional Studies 19.

Attachment B: AIATSIS Submission to the Native Title Organisations Review

claims at increasing rates, respond to the demands of future act requests and provide ongoing support to RNTBCs as they develop their own capacity and assert their authority in the management of their lands and waters and in the governance of the region.

While all NTRB/NTSPs engage in strategic planning and extremely detailed business and financial planning, there is a heavy reliance on historical funding patterns within the system. NTRBs/NTSPs are encouraged to apply for the funding they know they are likely to get, that is, asking for a dollar sum similar to previous years. A great deal of information is being lost in terms of unmet demand and potential new resource needs. This review provides an opportunity for a rebasing of budgets based on current and future trajectories of NTRB/NTSP activity. Bottom up budgeting would assist the Commonwealth in understanding the resource needs of the sector over the next ten years and develop federal Budget responses accordingly.

Recommendation 1: That consideration be given to new funding arrangements for NTRB/NTSPs informed by a comprehensive assessment of current and future workloads to include pre and post determination activities (including future acts).

3 RNTBCs roles and functions

AIATSIS research shows that the majority of RNTBCs have limited capacity to achieve more than their core native title functions to hold and manage native title. Functions of RNTBCs are set out under section 58 of the NTA and the Native Title (Prescribed Bodies Corporate) Regulations 1999 (Cth) (PBC Regulations). Under the regulatory framework, the recognised primary functions of RNTBCs are to:

- protect and manage determined native title in accordance with the objectives of the native title holding group; and
- ensure certainty for governments and other parties interested in accessing or regulating native title land and waters by providing a legal entity to manage and conduct the affairs of the native title holders.⁵²

RNTBCs need to operate effectively so that native title holders are able to utilise and maximise their native title rights and engage meaningfully in land management. There are significant gaps between the expectations that native title groups have for cultural, social, economic and community outcomes when a native title determination is achieved, and the reality for most RNTBCs who struggle to achieve more than their core native title functions without secure income streams.⁵³ This has led to RNTBC directors lamenting that ‘we spend all our time doing other people’s business’. This perception highlights the institutional, cultural and political tensions that RNTBCs face in realising benefits from their traditional lands and waters.

As noted above in section 2, RNTBC functions are provided for under s 56 of the NTA and the PBC regulations. Further, the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) (CATSI Act) covers aspects of financial reporting and governance. The NTA sets out a framework and

⁵²*Native Title Bill 1993*, explanatory memoranda.

⁵³Tran Tran, Claire Stacey and Pamela McGrath, 'Background Report on Prescribed Bodies Corporate Aspirations' (Report to Deloitte Access Economics for the FaHCSIA Review of Native Title Organisations, April 2013).

Attachment B: AIATSIS Submission to the Native Title Organisations Review

procedures for the holding or managing of native title which, in practice has produced and perpetuated legal relationships of great complexity. These legal relationships bear limited resemblance to the reality of native title as experienced by Aboriginal and Torres Strait Islander peoples.⁵⁴ RNTBCs have been described as the ‘practical legal mechanism by which the communal character of native title could be accommodated within the general property law system’.⁵⁵

3.1 PBC/RNTBC aspirations and challenges

AIATSIS research suggests that native title holders want to develop robust relationships between their RNTBC and the local Indigenous community. Supporting RNTBCs to become financially and operationally independent (if that is what they want), will go some way to assisting native title holders to achieve the full range of their social and economic ambitions.

Between March and August 2013, AIATSIS ran a nation-wide survey of RNTBCs (the AIATSIS 2013 PBC Survey) to establish the extent to which they are able to meet obligations and pursue aspirations under current funding and governance arrangements. At the time of this submission a representative sample of 27 RNTBCs had responded to the AIATSIS 2013 PBC Survey.⁵⁶ The administration of future act notifications and cultural programs and heritage management were reported as the main activities RNTBCs undertook since their establishment, followed by native title claims and land and sea management.⁵⁷ This survey data shows that it is not only the recognition process but also future act activities that will have an impact on native title rights and interests.

AIATSIS research with RNTBCs has identified that the challenges and constraints they face in realising aspirations include:

- Onerous and highly technical reporting obligations
- High levels of external demands on RNTBC resources
- Poor engagement and recognition of RNTBC by regulators and all levels of government
- Dysfunctional or poorly articulated relationships with NTRBs and other service providers
- Lack of access to reliable legal advice and financial management
- Lack of access to and skills in IT and administration
- Lack of capacity to successfully apply for external grants
- High costs associated with servicing membership and convening meetings for decision making

⁵⁴ Pamela Faye McGrath, Claire Stacey and Lara Wiseman, 'An overview of the Registered Native Title Bodies Corporate regime' in Toni Bauman, Lisa Strelein and Jessica Weir (eds), *Living with native title* (forthcoming).

⁵⁵ Anthropos Consulting, Ebsworth & Ebsworth and Senatore Brennan Rashid, 'Research Project into the issue of Funding of Registered Native Title Bodies Corporate' (Research report Aboriginal & Torres Strait Islander Commission, October 2002) 1.

⁵⁶ The number and location of respondents is comparable to the national distribution of PBCs by State/Territory location, with the notable exception of the Northern Territory where no PBCs have yet responded to the survey. The sample is also fairly representative of the national distribution by size of organisation as classified under the CATSI Act. See Appendix A for further details on survey methodology.

⁵⁷ Post determination activities contributed to the main activities of PBCs receiving 18 (67 per cent) responses and claims work receiving 14 (52 per cent) responses. Tourism received 17 (63 per cent) responses, business development or financial investment 14 (52 per cent) responses, and agriculture, aquaculture or commercial fishing 13 (48 per cent) responses. These responses suggest that post determination administration and management dominate the work of RNTBCs.

Attachment B: AIATSIS Submission to the Native Title Organisations Review

- Limited capacity to access traditional lands and exercise native title rights
- The complex and frequently overlapping jurisdictional legal and policy frameworks governing native title, charitable trusts, land management and future acts
- Constantly changing policy environments and a lack of appropriate consultation
- Low levels of youth engagement
- Lack of long-term strategies for managing material and intangible cultural heritage
- Lack of knowledge and skills for identifying and developing culturally-appropriate businesses and employment opportunities⁵⁸

Similar barriers were identified in the AIATSIS 2013 PBC Survey. The survey reveals that the current activities of RNTBCs do not match their long term aspirations. When asked what activities they would like to do in the future (but were currently unable to), most respondents identified commercial enterprises such as tourism, business development or financial investment, and agriculture, aquaculture or commercial fishing.⁵⁹ The second most common response were land and sea management.⁶⁰ When asked about RNTBC visions for the future, responses related to two key elements (i) strengthening the relationship between the RNTBC and the local Indigenous community and (ii) strengthening the community and cultural group itself.⁶¹ These broader aspirations need to be considered in the context of any reforms to resourcing and administration of the native title regime.

As native title is the recognition of traditionally-derived authority to exercise rights and interests in land, the aspirations of native title holders understandably include a desire to independently exercise this authority in a range of contemporary contexts.⁶² As noted above in section 2.1, this particular aspiration is articulated by both NTRBs/NTSPs and RNTBCs alike.

⁵⁸ Findings from RNTBC regional, state and national workshops and case studies have been synthesized into an aspirations document: Tran Tran, Claire Stacey and Pamela McGrath, 'Background Report on Prescribed Bodies Corporate Aspirations' (Report to Deloitte Access Economics for the FaHCSIA Review of Native Title Organisations, April 2013). See also Tran Tran et al, 'Native Title and Climate Change: Changes to country and culture, changes to climate: Strengthening institutions for Indigenous resilience and adaptation' (Final Report National Climate Change Adaptation Research Facility, 2013).

⁵⁹ Commercial enterprises such as tourism received 17 (63 per cent) responses, business development or financial investment 14 (52 per cent) responses, and agriculture, aquaculture or commercial fishing 13 (48 per cent) responses.

⁶⁰ Land and sea management received 15 (56 per cent) responses.

⁶¹ The majority of RNTBCs provided responses that focused, at least in part, on community and cultural resilience (18 (67 per cent)). The next most common types of responses were categorised as commercial aspirations (14 (52 per cent)) and aspirations for independence (13 (48 per cent)). Other common responses were categorised as aspirations for organisational resilience (that is, sustainability and strengthening of the PBC), land and sea management, and the creation of employment.

⁶² Tran Tran, Claire Stacey and Pamela McGrath, 'Background Report on Prescribed Bodies Corporate Aspirations' (Report to Deloitte Access Economics for the FaHCSIA Review of Native Title Organisations, April 2013). The House Standing Committee on Aboriginal and Torres Strait Islander Affairs has noted that 'sovereignty is about Indigenous people having the power to exercise real control over decision-making that affects their daily lives': House Standing Committee on Aboriginal and Torres Strait Islander Affairs, House of Representatives, Canberra, *Many Ways Forward: Report of the inquiry into capacity building and service delivery in Indigenous Communities* (2004), [4.24].

Attachment B: AIATSIS Submission to the Native Title Organisations Review

3.2 Barriers to developing RNTBC capacity

The Courts have noted that the capacity of an RNTBC to perform its functions once a determination has made is a relevant factor in deciding whether or not to make a determination under section 87 of the NTA. Reflecting on the RNTBC chairperson's comments on the lack of equipment and based capacity,⁶³ North J in *Nangkiriny*, said:

It would be an absurd outcome if, after the expenditure of such large sums to reach a determination of native title, the proper utilisation of the land was hampered because of lack of a relatively small expenditure for the administration of the PBC.⁶⁴

AIATSIS research suggests that adequate funding is the primary barrier to developing capacity. In the AIATSIS 2013 PBC survey 16 (59 per cent) reported that they did not have any regular money coming in to their organisation, while 11 (41 per cent) reported that they did.⁶⁵

Beyond funding, the following issues were also identified in the AIATSIS 2013 PBC survey as barriers to achieving ambitions (reported here in order of importance):

- lack of experienced and/or trained staff
- inadequate resourcing (including infrastructure, office and equipment)
- lack of commercial opportunities and/or preparedness
- policy and the political environment of native title.⁶⁶

Our research also suggests that directors of RNTBC's need to be supported to develop better and more relevant skills and expertise in line with their organisation's priorities. Specifically, they are seeking to develop greater skills in the areas of:

- governance
- administration (including financial literacy)
- commerce (for example, business planning), and
- law (particularly native title law)⁶⁷

⁶³*Nangkiriny v Western Australia* [2004] FCA 1156 at [9]-[11]. The chairperson said:

'The KTLA has no office, no telephone and no fax machine. As the Chairman has stated, "I may be the Chairman, but we can't afford a chair." The lack of basic equipment means that its capacity to hold meetings, respond to Future Act notices and otherwise carry out its functions in accordance with the Act and with the KTLA Rules is severely limited.'

⁶⁴*Nangkiriny v Western Australia* [2004] FCA 1156 at [9]-[11].

⁶⁵Of the 11 RNTBCs that reported having regular money coming in this was attributed mainly to future act compensation or royalty agreements (4 (36 per cent)) with other income coming from the RNTBC's own business operations (3 (27 per cent)), the Federal Government (2 (18 per cent)), the private sector (2 (18 per cent)). Other income was received from State Government and philanthropic sources.

⁶⁶Geoff Buchanan and Claire Stacey, 'AIATSIS 2013 PBC Survey' (Preliminary analysis, Australian Institute of Aboriginal and Torres Strait Islander Studies, unpublished). 21 (78 per cent) of the total respondents to the AIATSIS 2013 PBC survey indicated funding was an issue that hampered the achievement of aspirations. A majority of PBCs (15 (56 per cent)) also reported the lack of experienced and/or trained staff as a barrier. Other significant barriers reported were resourcing (i.e. inadequate infrastructure, office and equipment) (9 (33 per cent)), commercial opportunities and/or preparedness (9 (33 per cent)), and policy and the political environment of native title (8 (30 per cent)). This last barrier included references to a lack of adequate recognition of native title holders by government and private enterprise illustrating some of the external factors impacting on RNTBC capacity.

Attachment B: AIATSIS Submission to the Native Title Organisations Review

A reliance on volunteer labour is also a pressing issue. AIATSIS research indicates that many RNTBCs do not have paid employees. Instead RNTBCs rely overwhelmingly on the volunteer labour of directors and NTRB/NTSP staff, with whom they have often had a long association but over whom they have no authority or direction. RNTBCs have expressed a desire to have employees, with management, administration, legal, cultural heritage, and land and sea management capabilities.⁶⁸ RNTBCs also rely heavily on external advisors for specific expertise, with the most common forms of independent advice being in the areas of legal advice and governance, followed by financial, strategic planning and business development.⁶⁹ RNTBCs would also like to receive advice on corporate and information management, community development, strategic planning, environmental planning and management, and research engagement.⁷⁰

One of the most critical barriers preventing RNTBCs from achieving more is a lack of access to basic infrastructure and communication technologies, with some smaller RNTBCs reporting that they do not own or even have access to office space, computers, printers, reliable internet, vehicles and telephones.⁷¹ AIATSIS research has shown that the simple fact of having an office front within the community can bring substantial benefits, in providing continuity and access to corporate

⁶⁷Ibid. The most commonly reported area of skill, knowledge or expertise required by PBC Directors was in the area of governance (including leadership) (18 (67 per cent)). The second most common response was administration skills (including financial literacy) (10 (37 per cent)). Other responses were categorised into cultural (particularly knowledge of Law, people and country), commercial (e.g. business planning), and legal (particularly understanding of native title law). A small number of PBCs also noted the need for literacy skills (reading, writing and computers) as well as skills in mediation and negotiation (both within the community and with government and private companies).

⁶⁸Ibid. An overwhelming majority of RNTBCs who responded to the Survey did not have employees; further, many of the directors work on a voluntary basis. Most PBCs (20 (74 per cent)) reported that they did not have paid employees, with only 7 (26 per cent) reporting that they did. Overall, the survey results suggest that at least 8 paid staff were employed directly by PBCs surveyed. Paid positions identified in the survey were in management, administration, support role, legal, cultural heritage, and land and sea management positions.

⁶⁹Ibid. The most common expertise sought was legal advice and advice on governance (both 17 (63 per cent)). The next most common types of advice received were financial, strategic planning and business development (all 12 (44 per cent)).

⁷⁰Ibid. The most common forms of advice PBCs said they would like to receive from independent experts were corporate management and information management (both 17 (63 per cent)). These were closely followed by advice on community development, strategic planning, environmental planning and management, and anthropological or other research (all 16 (59 per cent)). Half or more also wanted financial, legal, business development and/or mediation and facilitation advice.

⁷¹Ibid. The majority of RNTBCs participating in the AIATSIS 2013 PBC survey had access to basic infrastructure critical to the administration of their native title lands. However, the majority (17 (63 per cent)) also reported either not having an office or having an office that did not meet their needs. A significant proportion did not own or have access to office equipment. Further, half of the respondents said that they did not own and could not access a motor vehicle when needed. In the AIATSIS 2013 PBC survey, 16 (59 per cent) reported that they had an office. Most offices were leased (7 (26 per cent)) with only three PBCs reporting that they owned their office. Of the 16 PBCs that had an office, 10 (63 per cent) reported that this office met their needs, while 6 (38 per cent) reported that it did not. Twelve (44 per cent) reported that they owned a printer or photocopier, 11 (41 per cent) that they could access one when needed, and 4 (15 per cent) that they did not own and could not access a printer or photocopier when needed. Thirteen (48 per cent) reported that they owned a telephone (land line or mobile), 11 (41 per cent) that they could access one when needed, and 3 (11 per cent) that they did not own and could not access a telephone when needed. Thirteen (48 per cent) reported that they owned a computer, 10 (37 per cent) said that they could access one when needed, and 4 (15 per cent) that they did not own and could not access a computer when needed.

Attachment B: AIATSIS Submission to the Native Title Organisations Review

information, providing an access point for third parties and, importantly a point of context for native title holders and the local community to remain informed and involved. For example the Djabugay office was opened in Kuranda in January 2007, with many stakeholders contacting Djabugay through the office, 'expressing relief that there was finally a point of contact for conducting business.'⁷² However, despite the benefits of having an operational office, the Djabugay Governing Committee has to manage a considerable degree of uncertainty as to the future of its office and employment of its staff. This lack of stability has the potential to undermine the RNTBC into the future.

The role of governments in supporting RNTBC capacity

In mining-intensive areas there is some potential for NTRB/NTSP assistance to become self-funding, but these organisations are a minority. The vast majority of RNTBCs will not have sufficient private revenue and resources at their disposal to 'purchase' services from NTRBs/NTSPs or from the private sector.

Given the 'governmental' nature of many of the functions of RNTBCs, state and federal government programs are likely to be a significant source of funding and capacity development. One of the policy areas where there has been greatest confluence between RNTBC priorities and government spending is through land management programs. Native title has been recognised over vast areas of what was previously considered vacant Crown land and other forms of Crown reserves and tenures. There is a subtle transfer of responsibility occurring in the management of these estates. Investment in land management has seen growth in the capacity of RNTBCs through Indigenous Protected Areas (IPAs) and the Working on Country ranger program funded by the Federal Government. The benefits of these programs are felt on multiple scales, contributing to community well being, achieving some Indigenous land management aspirations while at the same time, reducing net financial cost to the Federal government.⁷³ There is unrealised potential for the development of a range of environmental services to be provided by RNTBCs at the state level.

3.3 Sustainable settlements

While RNTBC support has been considered on a limited funding level, there remain only a handful of examples across all jurisdictions where the ongoing governance costs of RNTBCs has been seriously considered in the settlement of claims . For example, during the establishment of the Lhere Artepe Aboriginal Corporation (LAAC) RNTBC, the Northern Territory Government provided a one-off establishment grant of \$200 000 for the employment of a coordinator and clerk contingent on the

⁷²Toni Bauman, 'The Djabugay native title story: getting back in town, Living with Native Title: Registered Native Title Corporations' in Toni Bauman, Lisa Strelein and Jessica Weir (eds), *Living with native title* (forthcoming) , 17-18.

⁷³These efficiencies and benefits have been specifically identified that the real cost was over \$10 million less due to savings made in other policy areas: The Allens Consulting Group, 'Assessment of the economic and employment outcomes of the Working on Country Program' (Report to the Department of Sustainability, Environment, Water, Population and Communities, October 2011) <<http://www.environment.gov.au/indigenous/workingoncountry/publications/pubs/woc-economics.pdf>>.

Attachment B: AIATSIS Submission to the Native Title Organisations Review

completion of a strategic business plan.⁷⁴ This one off funding however did not include on-costs associated with living in remote areas, nor did it realistically consider the funding needs of the RNTBC in the longer term.⁷⁵

Claims resolution in Australia focuses on settling the legal rights and interests currently held by the native title group and does not account for historical grievances or dispossession. This approach is in part due to the separation of native title determination and compensation proceedings, but also, the unique approach taken by the High Court to the question of compensation. In *Mabo*, the High Court held that until the introduction of the *Racial Discrimination Act* (Cth) in 1975 it was legal to discriminate against Aboriginal and Torres Strait Islander peoples and to deny them the rights afforded to other property holders under Australian law. This extended to denying the protection of constitutional guarantees of just terms compensation for the acquisition of property. As a result, the nature and scale of 'settlements' of native title claims in Australia is very different to settlement negotiations in other settler countries. Because the Australian system encourages a legalistic approach to settling native title, the negotiation of a political settlement that addresses the broader historical relationship between Indigenous peoples and the state remains outstanding.

Recognising the limitations of the existing legalistic framework, new developments in Victoria and southwest Western Australia have taken a different approach, focused on the concept of sustainable settlements. These settlements aim to provide an established funding base over the long term.⁷⁶

For example, the Western Australian Government has presented the South West Aboriginal Land and Sea Council (SWALSC) with a final offer to resolve native title claims across the south west of Western Australia. The offer includes statutory recognition, a \$600 million trust, funding for corporate administration as well as specific initiatives for economic development, cultural programs, heritage and housing.⁷⁷ The most critical component of this agreement is a commitment to provide support to achieve the aspirations of native title claimants. These aspirations have provided the foundation for negotiations over the final agreement illustrating a 'bottom up' approach that does not constrain traditional owners to 'legalistic' arguments in favour of compensation.

While AIATSIS submits there is a need for a federal funding program dedicated to RNTBC capacity, the most appropriate funding model for RNTBCs in the long term is not to rely on merely an annual funding program, but a combination of a negotiated sustainable settlements and service level agreements. AIATSIS also submits that such a broader approach is consistent with ensuring greater efficiency in the native title system. This will be discussed further in section 5 below.

⁷⁴Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Account, *Inquiry into Native Title Representative Bodies* August 2004 (submission made by the Northern Territory Government).

⁷⁵The ANAO has commented on the constraints created by inconsistent and stable funding on Indigenous organisations, especially within remote areas: Australian National Audit Office, 'Capacity Development for Indigenous Service Delivery' (Audit Report No 26, Australian National Audit Office, February 2012).

⁷⁶See further: Emily Gerrard, 'Victoria : Victorian native title settlement framework' (2009) 28(2) *Australian Resources and Energy Law Journal* 140.

⁷⁷Western Australian Government, 'The South West Settlement' (Summary Department of Premier and Cabinet, July 2013) <<http://www.dpc.wa.gov.au/lantu/MediaPublications/Documents/The%20South%20West%20Settlement-A-Summary-July-2013-Final.pdf>>.

Attachment B: AIATSIS Submission to the Native Title Organisations Review

Recommendation 2: That State and Commonwealth governments enter into settlements in the context of existing claims and claims already resolved to establish a sustainable funding base to support native title governance structures.

3.4 Supporting regional and national representation

RNTBCs have expressed frustration at being poorly represented in policy and decision making affecting their rights and interests. State government legislative regimes and ways of doing business on country have also been slow to change to recognise and accommodate native title and the role of RNTBCs within the decision-making frameworks, for example in land use planning.⁷⁸ While NTRBs/NTSPs and the NNTC currently provide a voice in these debates, particularly in relation to the recognition and protection of native title, the perspective of RNTBCs across the growing breadth of activities and challenges have prompted calls for direct input and a more audible national voice. These calls have resulted in efforts towards the establishment of a peak body to represent the collective interests of RNTBCs in 2009 at the Second National Meeting of RNTBCs.⁷⁹ and were renewed in 2011 and then at the 2013 National Native Title Conference in Alice Springs.

The success of the NNTC in both representing the interests of native title representative bodies but also, in providing an access point for those wishing to access the views of NTRBs/NTSPs demonstrates the value of a national peak body in this area. However, in the medium term at least, efforts by RNTBCs will be hindered by the challenges of establishing a mandate for this body, especially in the absence of sufficient resources to bring together representatives from all RNTBCs nationwide. Additionally, any RNTBC representatives would face significant financial and capacity restraints, particularly in taking on additional responsibilities in addition to those they already have for their own RNTBCs which they often carry out voluntarily.⁸⁰

In the interim, AIATSIS has been able to secure ad hoc funding to work with RNTBCs and NTRB/NTSPs at the regional and state level as well as to arrange opportunities for RNTBCs to meet nationally. These opportunities have been highly valuable to exchange ideas and experiences, meet with key stakeholders and identify new opportunities for funding and partnership. Some NTRB/NTSPs have continued to hold regional meetings. For others, the costs are prohibitive and cannot be accommodated within existing priorities.

A number of NTRB/NTSPs have continued to hold regional meetings, including Torres Strait Regional Authority (TSRA), Native Title Services Victoria (NTSV), and North Queensland Land Council (NQLC) (discussed in relation to NTRB/NTSP support below). These forums are a critical element of capacity building for the entire system, not only in developing the knowledge base of RNTBCs and improving the visibility of RNTBCs as a sector, but also, the meetings have proved an incredibly popular point of contact for government agencies and other stakeholders wishing to connect with RNTBCs. For

⁷⁸Nick Duff, 'Managing Weeds on Native Title Lands' (Workshop Report Australian Institute of Aboriginal and Torres Strait Islander Studies, December 2011); Tran Tran et al, 'Native Title and Climate Change: Changes to country and culture, changes to climate: Strengthening institutions for Indigenous resilience and adaptation' (Final Report National Climate Change Adaptation Research Facility, 2013).

⁷⁹Toni Bauman and Cynthia Ganesharajah, 'Second National Meeting of Registered Native Title Bodies Corporate Meeting: Issues and Outcomes Melbourne 2 June 2009' (Native Title Research Reports, Canberra, 2009. No 2, Australian Institute of Aboriginal and Torres Strait Islander Studies, 2009).

⁸⁰A half-day meeting prior to the conference was attended by 49 RNTBC representatives, representing 36 RNTBCs from Queensland, New South Wales, Victoria, South Australia, Northern Territory and Western Australia, however it was a much smaller scale than previous national meetings held in 2007 and 2009, due to a lack of funding to support a meeting, and the increased costs of providing travel assistance to the growing number of RNTBCs.

Attachment B: AIATSIS Submission to the Native Title Organisations Review

example, Torres Strait RNTBC meetings held twice yearly over a three year period included consultations with the Torres Strait Protected Zone Joint Authority (PZJA), Torres Strait Regional Authority (TSRA), Federal Government, Queensland Government, Torres Strait Islands Regional Council (TSIRC) and Torres Shire Council (TSIRC) and other RNTBCs.⁸¹

These regional meetings and support programs are critical infrastructure for the effective operation of native title post determination, yet are restrained by ad hoc funding that creates further inefficiencies in organising participation and effective agendas for such meetings.

Recommendation 3: That State and Commonwealth governments acknowledge, promote and facilitate regional and state wide meetings of RNTBCs as a valuable and appropriate function of NTRB/NTSPs.

Recommendation 4: That opportunities for RNTBCs to meet collectively are leveraged from existing forums (such as NTRB/NTSP annual general meetings, ORIC training or the Native Title Conference) to enable RNTBC networking and information sharing.

Outcomes of the Review of NTOs

One of the key priorities expressed at every RNTBC forum held at regional or national levels, is achieving a direct funding regime in future budgets, and this is seen as particularly important in the context of the current Review of Native Title Organisations. In the context of the Review, RNTBC representatives present at the National Native Title Conference 2013 commented that the proposed consultation schedule was inadequate.

Any proposals emerging from this review that significantly change the system that native title holders are required to operate within, would require adequate consultation and a much broader schedule of engagement with Aboriginal and Torres Strait Islander people, such as that proposed by the Aboriginal and Torres Strait Islander Social Justice Commissioner in the 2010 Native Title Report.⁸²

Recommendation 5: That the Commonwealth engage in a comprehensive consultations with RNTBCs on any proposed changes to the NTA or policy and funding framework affecting RNTBCs.

4 NTRB/NTSP support for PBCs/RNTBCs

NTRBs/NTSPs have accommodated evolution in the native title sector to include post determination functions and support for RNTBCs. These functions include managing demands for access to native title land through the Future Act and ILUA processes established under the NTA. Some of these roles are provided for under section 203 BJ (inserted in 1998) which includes additional functions, such as capacity building, that aim to improve the native title system.

⁸¹Lisa Strelein, 'Native Title Bodies Corporate in the Torres Strait: Finding a place in the governance of a region' in Toni Bauman, Lisa Strelein and Jessica Weir (eds), *Living with native title* (forthcoming).

⁸²Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2010* (Australian Human Rights Commission, 2010).

Attachment B: AIATSIS Submission to the Native Title Organisations Review

However, the RNTBC support role of NTRBs/NTSPs brings another level of complexity driven by the diversity of RNTBCs. Our research with RNTBCs has mapped significant points of diversity amongst RNTBCs, in terms of:

- the nature and extent of the group's native title rights (including exclusive or non-exclusive title) and whether the determination recognises shared country between neighbouring groups;⁸³
- the size, age profile and location of residence of the native title group;
- the level and type of future act activity in their determination area;⁸⁴
- the existence of future act or other native title agreements that deliver significant financial benefits to the group;
- the group's relationship with their local NTRB/NTSP;
- the age and corporate history of the RNTBC;
- the corporation's administrative capacity and access to infrastructure (such as staff and office space);
- the skills and knowledge of its directors;
- the organisation's corporate structures and the interaction between them;
- the geographical location of the group's determination area and its proximity to economic centres;
- the nature of the political relationship between the native title group and their respective state or territory government;
- the political cohesiveness of the native title group;⁸⁵
- the existence of Indigenous Land Use Agreements; and
- the specific social and cultural aspirations of the native title group.

Direct support to RNTBCs will vary depending on the needs and capacity of each individual RNTBC. The factors identified above can result in enormous diversity even in neighbouring RNTBCs. Some RNTBCs may need the most extensive form of support, which shades in to carrying out the functions on behalf of the RNTBC, while even the largest RNTBCs may need expert advice on complex future act matters.

Despite this diversity there are also common priorities across the sector. Recent research by AIATSIS suggests that the key aspirations of RNTBCs broadly fall into the following categories:

- independence and autonomy;
- respect and recognition of Indigenous land ownership and decision making authority;
- caring for country, culture and people; and
- community and economic development.⁸⁶

⁸³For example, the Nyangumarta Karajarri Aboriginal Corporation RNTBC was established for a shared country determination, despite the existence of established RNTBCs for both Nyangumarta and Karajarri people. See also Eastern Maar Aboriginal Corporation RNTBC in Victoria and Gunggandji-Mandingalbay Yidinji Peoples PBC Aboriginal Corporation RNTBC in Queensland for other examples of shared country RNTBCs.

⁸⁴Donna Oxenham and Lisa Strelein, 'Prescribed Bodies Corporate, NTRBs and the native title group: managing native title post-determination, Part 1: Desktop Review' (Native Title Research Report No 2/2006 AIATSIS, 2006) 17.

⁸⁵Toni Bauman and Tran Tran, *First National Prescribed Bodies Corporate Meeting : issues and outcomes: Canberra, 11-13 April 2007* (Australian Institute of Aboriginal and Torres Strait Islander Studies, 2007).

Attachment B: AIATSIS Submission to the Native Title Organisations Review

We submit that recognition of the needs of native title holders post determination provides the important initial steps for further capacity building in order to achieve these broader long term aspirations. These support roles are roughly divided into:

- Facilitation and mediation
- Meeting and travel assistance
- Governance
- Government liaison/negotiation
- Agreement making, implementation and monitoring
- Business development
- Distribution of benefits
- Native title legal support
- Cultural heritage management
- Land and sea management
- Strategic planning

In the AIATSIS 2013 PBC Survey, RNTBCs reported that the support currently received from NTRBs/NTSPs is not enough, according to the aspirations of native title holders and their representative organisation. However failure of the system to meet RNTBC aspirations is a matter of funding and administration.⁸⁷ Up until recently, NTRBs/NTSPs were able to access funding from FaHCSIA 'to support...essential day-to-day operations (administrative costs)'.⁸⁸ A similar set of guidelines apply for RNTBCs located in the Torres Strait, which are administered by the TSRA.⁸⁹ These guidelines place an emphasis on the role NTRBs/NTSPs as conduits for RNTBC specific funding, making funding available to RNTBCs only where there is demonstrated conflict with the NTRB/NTSP in question.⁹⁰

Recent AIATSIS research indicates that common support provided by NTRBs/NTSPs to RNTBCs consisted of (in order of occurrence):

- legal services and advice (including future acts management and corporate compliance)
- meeting and travel assistance
- assistance with establishing corporations and governance structures
- administrative services (for example, funding applications and management of grants, post box for future act notification)

⁸⁶Tran Tran, Claire Stacey and Pamela McGrath, 'Background Report on Prescribed Bodies Corporate Aspirations' (Report to Deloitte Access Economics for the FaHCSIA Review of Native Title Organisations, April 2013).

⁸⁷As discussed above, the most common thing that PBCs reported as a barrier to them doing the activities they wanted to do was funding (21 (78 per cent)).

⁸⁸Australian Government, 'Basic Support Funding for Prescribed Bodies Corporate' (Guidelines Department of Families, Housing, Community Services and Indigenous Affairs, February 2011) <<http://www.aiatsis.gov.au/ntru/docs/resources/rntbc/toolkits2011/FaHCSIAguidelines.pdf>>.

⁸⁹Australian Government, 'Prescribed Bodies Corporate' (Grant Guidelines Torres Strait Regional Authority, August 2013) <http://www.tsra.gov.au/__data/assets/pdf_file/0014/4424/Program-Guidelines-Prescribed-Bodies-Corporate.pdf>.

⁹⁰Australian Government, 'Basic Support Funding for Prescribed Bodies Corporate' (Guidelines Department of Families, Housing, Community Services and Indigenous Affairs, February 2011) <<http://www.aiatsis.gov.au/ntru/docs/resources/rntbc/toolkits2011/FaHCSIAguidelines.pdf>>, part D section 1.2.

Attachment B: AIATSIS Submission to the Native Title Organisations Review

- facilitation and mediation
- agreement implementation and monitoring⁹¹

Our research suggests that RNTBCs would like to see this support expanded to include:

- business development
- assistance with the distribution of benefits
- file management and information archiving (including holding cultural information on the RNTBCs behalf)⁹²

AIATSIS submits that these support services whether for established or establishing RNTBCs, should not compete with already limited funding for the resolution of claims. AIATSIS submits that post determination functions also require adequate resourcing in order to ensure the continued protection of native title rights and interests. The priorities generated through funding preferences could be better negotiated through flexibility in funding models for NTRBs.

Recommendation 6: That RNTBC support services whether for established or establishing RNTBCs, not compete with already limited funding for the resolution of claims.

4.1 Models for support of RNTBCs

RNTBC support officers

There is a growing network of RNTBC support officers that AIATSIS has supported through a PBC Support Officer Network. RNTBC support officers have also had opportunities for learning exchanges at FaHCSIA field officer forums and also Aurora training events throughout 2013. This network has been operational for one year and during this time there has been an increasing number of dedicated positions within NTRBs/NTSPs to meet the needs of RNTBCs. The way that NTRBs/NTSPs provide support to RNTBCs is unique to each region, reflecting the diversity of both NTRBs and RNTBCs. AIATSIS notes that submissions from individual NTRBs/NTSPs will likely outline in much greater detail the type of support that they provide to RNTBCs in their region; however a broad overview is provided here.

The Cape York Land Council (CYLC) has a PBC Support Unit with dedicated RNTBC support staff, who undertake a coordinating function and provide compliance support. These functions are also moving into strategic and business planning.⁹³ The CYLC, like many NTRBs, are confronted with the

⁹¹Geoff Buchanan and Claire Stacey, 'AIATSIS 2013 PBC Survey' (Preliminary analysis, Australian Institute of Aboriginal and Torres Strait Islander Studies, unpublished). From the AIATSIS 2013 PBC survey, the most common form of support received by the 23 PBCs currently supported by a NTRB or NTSP was in the form of legal services and advice (including future acts management and corporate compliance) (20 (87 per cent)). The next most common forms of support were meeting and travel assistance (17 (74 per cent)), assistance with establishing corporations and governance structures (15 (65 per cent)), administrative services (e.g. funding applications and management of grants, post box for future act notification) (15 (65 per cent)), facilitation and mediation (14 (61 per cent)), and agreement implementation and monitoring (13 (57 per cent)).

⁹²Ibid. The most common form of support RNTBCs reported as wanting to get from a NTRB or NTSP was in the area of business development (12 (44 per cent)). The next most popular forms of support desired by PBCs were in the distribution of benefits (10 (37 per cent)) and file management and information archiving (including holding cultural information on the RNTBCs behalf) (9 (33 per cent)).

⁹³Cape York Land Council, *Annual Report* (2012), 20.

Attachment B: AIATSIS Submission to the Native Title Organisations Review

challenges of delivering services to RNTBCs located in very remote and often hard to access areas.⁹⁴ South Australia Native Title Services (SANTS) has also recently invested in capacity development to assist native title holders to achieve their aspirations through governance training and to improve governance practices – an area that SANTS is committed to strengthening.⁹⁵

In regions where there are a small number of outstanding claims, NTRBs have transitioned into providing key support services to a post determination landscape. For example, NTSV have established a policy unit with collective support in areas of communication and media; natural resource management; corporate governance and economic development. This support work carried out by NTSV also includes providing secretariat support to the newly established Federation of Victorian Traditional Owner Corporations (described further below) which includes RNTBCs and other traditional owner corporations that have achieved native title outcomes through alternative settlements, such as the Dja Dja Wurrung.

NTSV also supported the first meeting of RNTBCs in 2012 and has committed to twice yearly meetings.⁹⁶ NTSV has guidelines for assistance, which are used to establish priorities for the types of assistance it will provide native title claimants and holders.

The TSRA has a dedicated PBC Support Officer located with the Governance and Leadership arm of TSRA who provides comprehensive capacity building support for PBCs to coordinate training, assist with ORIC compliance and help in the delivery of other TSRA programs such as land management, economic development and health. The North Queensland Land Council has been coordinating governance workshops for the growing number of RNTBCs in the region (as of June there were as many RNTBCs in NQLC as there were in the Torres Strait region) and also been working on developing a guides and resources for RNTBCs.

In other areas where there is no identified RNTBC support officer position, support is provided through work flows from a range of legal and field officer staff. The Central Land Council (CLC) does not have a dedicated RNTBC officer but has a specialised lawyer dedicated to RNTBCs. Central Desert Native Title Services (CDNTS) provide support in terms of governance issues, land management and maintaining cultural knowledge. A key concern for the region is language, as English is a not a first language for many of the RNTBC directors. These language barriers can result in challenges around ensuring that traditional decision making processes are consistent with the constitution of the RNTBC. CDNTS also extend their financial expertise to RNTBCs by attending directors meetings to ensure that traditional owners are maximising financial benefits received from their native title.⁹⁷

Similarly the Kimberley Land Council (KLC), while not having a dedicated position, integrates RNTBC support in its activities. The KLC provides governance support and logistical support for annual general meetings and directors meetings. KLC also offers legal support for future acts in relation to exploration, tourism and government activity. There are also governance projects – for both determined and soon to be determined groups. The governance projects are looking at decision making and structural models as well as the integration of traditional decision making models into the corporate governance requirements of the CATSI Act.

⁹⁴Ibid.

⁹⁵South Australia Native Title Services, *SANTS Annual Report 2012* (2012), 9.

⁹⁶Native Title Services Victoria, 'Annual Report' (2012), 11.

⁹⁷PBC Support Officers network teleconference meeting, 24 October 2012, Native Title Research Unit, AIATSIS.

Attachment B: AIATSIS Submission to the Native Title Organisations Review

These diverse models of support reflect the diversity of native title holders (as discussed above) as well as the internal governance and structural arrangements currently in place in NTRBs/NTSPs. AIATSIS notes that the innovations NTRBs/NTSPs have demonstrated with respect to the evolving native title sector should not be stifled by unduly onerous funding requirements that impede their successful adaptation to the needs and aspirations of RNTBCs.

Shared Understanding about roles between RNTBCs and NTRB/NTSPs

In 2007 two national meetings of NTRBs/NTSPs and then of RNTBCs paid particular attention to the relationship between NTRBs/NTSPs and RNTBCs. There, the notion of memoranda of understanding (MOUs) between the RNTBC and NTRB/NTSP were first raised, as a means to establish clear expectations about what support the NTRB/NTSP was being asked to and could provide. It is timely to revisit the idea of MOUs or service agreements to open a discussion and clarify roles and accountabilities within the relationship. Such discussions and agreements may be particularly important where NTRBs/NTSPs are applying for or administering funding and income on behalf of RNTBCs. AIATSIS recognises that there may be a number of models to discuss and agree on respective roles and responsibilities and levels of support, for example, the NSTV Guidelines discussed above. Other models may range from formal service agreements through to informal regular planning meetings. Given the diversity of circumstances it would not be appropriate to make one model mandatory.

Recommendation 7: That models for agreed services, roles and accountabilities between RNTBCs and NTRBs/NTSPs be investigated.

Direct Funding for RNTBCs

Independence is the key aspiration that RNTBCs seek.⁹⁸ While RNTBCs have continually expressed a preference for direct funding, the 2013 FaHCSIA guidelines for funding of RNTBCs generally encourage RNTBC funding applications to be made through their NTRB/NTSP and state that 'direct funding of PBC basic support is likely to be a rarity'.⁹⁹ The special circumstances warranting direct funding include: where the original native title claim was not handled by the NTRB/NTSP for the area; where there is a significant conflict of interest between the PBC and the NTRB/NTSP; or where there is demonstrated good governance and demonstrated ability to administer and account for funding.¹⁰⁰ The underlying assumption seems to be that RNTBCs attempting to access basic financial assistance through this scheme are unlikely to have the capacity to accountably administer their own affairs.

As of January 2013, FaHCSIA advised that no grants of direct funding to RNTBCs have been made since the program for basic support funding was introduced in 2007, and NTRBs and NTSPs have

⁹⁸Tran Tran, Claire Stacey and Pamela McGrath, 'Background Report on Prescribed Bodies Corporate Aspirations' (Report to Deloitte Access Economics for the FaHCSIA Review of Native Title Organisations, April 2013).

⁹⁹Australian Government, 'Basic Support Funding for Prescribed Bodies Corporate' (Guidelines Department of Families, Housing, Community Services and Indigenous Affairs, February 2011) <<http://www.aiatsis.gov.au/ntru/docs/resources/rntbc/toolkits2011/FaHCSIAguidelines.pdf>>.

¹⁰⁰*Ibid.*

Attachment B: AIATSIS Submission to the Native Title Organisations Review

remained the primary administrators of federal government assistance.¹⁰¹ While this arrangement may work for some RNTBCs, others have expressed concerns that channelling funding through NTRBs or NTSPs reinforces RNTBC dependence and undermines progress towards autonomy and independence.¹⁰²

It will be rare that an RNTBC will have no relationship with the NTRB/NTSP. However, it is important to invest in capability of RNTBCs where possible, whilst still maintaining the capacity of the NTRB/NTSP to have an overarching perspective on the native title system within their region. The capacity to administer funds should be the determining factor of whether a RNTBC can apply directly for funds.

The key non-financial constraint that NTRBs face in supporting RNTBCs occurs where there is either no relationship between a NTRB and a RNTBC (this may have occurred because the RNTBC pursued their native title claim completely independently of the NTRB) or where this relationship has broken down to such a degree that there is entrenched conflict between a NTRB and a RNTBC. As noted above, funding preferences supporting the finalisation of native title claims for NTRBs/NTSPs places an additional constraint on the ability of NTRBs/NTSPs to provide support post determination.

Recommendation 8: That direct financial assistance to RNTBCs be based on their capacity to administer funds.

Alternative regional support structures

NTRBs/NTSPs are exploring new and emerging post-determination models for RNTBC support that include structures outside the NTRB/NTSP.

In Victoria, the Federation of Victorian Traditional Owner Corporations (FVTOC) was established as an ASIC listed company (limited by guarantee), in 2013 as an alliance of the four Victorian RNTBCs and one Traditional Owner Settlement Entity (an outcome of negotiations under the *Traditional Owner Settlement Act 2010* (Vic)). The establishment of the FVTOC has been supported by NTSV, which acts as secretariat to the Federation. A key role of the Federation will be the opportunity for RNTBCs and other traditional owner corporations to respond collaboratively to relevant state and federal government policy. The Federation also aims to explore commercial collaborations.

Another example of NTRB/NTSP involvement in the post-determination activities of native title groups is the KLC's involvement in the creation of the Kimberley Regional Economic Development Corporation (KRED). KRED was established under the auspices of the KLC to harness the benefits arising from future act activity in the Kimberley. In addition, regional trusts have been established in the Kimberley and governed by traditional owners with administrative support provided by the KLC. Regional trusts are modelled upon decision making via a committee of traditional owners with the KLC receiving submissions for predetermined categories or 'buckets' of funds.

Currently, the Commonwealth funding model does not allow alternative regional bodies to apply for RNTBC support. Moreover, RNTBCs do not currently have sufficient resources to 'purchase' these support services where they do not have independent income.

¹⁰¹ Gina Howlett at FaHCSIA, pers. comm., with C Stacey, 19 February 2013.

¹⁰² Toni Bauman and Tran Tran, *First National Prescribed Bodies Corporate Meeting : issues and outcomes : Canberra, 11-13 April 2007* (Australian Institute of Aboriginal and Torres Strait Islander Studies, 2007), 10.

Attachment B: AIATSIS Submission to the Native Title Organisations Review

Other support

As noted above, about 74 per cent of respondents to the AIATSIS 2013 PBC survey do not have paid staff and are contingent on NTRBs/NTSPs in order access professional expertise.¹⁰³ However statutory native title functions are not the sole aspiration of RNTBCs even though it dominates the current bulk of their work.

A number of RNTBCs report that they have attempted to secure funding through both government and non-government programs to support operational needs in the areas of land and sea management, commercial development or planning, and community programs. About half of these attempts were reported as successful.¹⁰⁴

RNTBCs work with a range of other organisations outside of NTRBs/NTSPs, including Aboriginal or Torres Strait Islander community organisations (for example, Balkanu Cape York Development Corporation and the Kimberley Aboriginal Law and Culture Centre), local government, state government departments, commonwealth government, private companies and not-for-profit organisations.¹⁰⁵

Recommendation 9: That further research be carried into the support networks and needs of RNTBCs now and in the future.

Non RNTBC corporations

There are a number of Aboriginal and Torres Strait Islander corporations (often referred to as 'native title corporations' or 'traditional owner corporations') that are not RNTBCs but have generated native title outcomes without having a native title determination. This may have occurred in various ways, including through pre determination future act agreements or other activities such as heritage, state settlements such as the Ord and Burrup agreements in Western Australia.¹⁰⁶ Such agreements can create additional support for RNTBCs, for example the Miriwung Gajerrong Corporation provides services to two Miriwung Gajerrong RNTBCs; while others operate independently of the RNTBC, particularly where multiple groups are involved.

¹⁰³See above in section 3.4.

¹⁰⁴Geoff Buchanan and Claire Stacey, 'AIATSIS 2013 PBC Survey' (Preliminary analysis, Australian Institute of Aboriginal and Torres Strait Islander Studies, unpublished). Most of the PBCs surveyed (20 (74 per cent)) reported that they had applied for funding from a government or non-government organisations, while 7 (26 per cent) reported that they had not. Of those that had applied, 12 (60 per cent) reported that they had been successful. Funding was identified for operational needs (10 (37 per cent)) – for example, through FaHCSIA's PBC support funding program. The remainder were for land and sea management (3 (11 per cent)), commercial development or planning (3 (11 per cent)), and community programs (1 (4 per cent)).

¹⁰⁵Ibid. The most common links PBCs reported having with non-native title organisations were with private commercial companies (11 (41 per cent)). However, there was also engagement across the local (10 (37 per cent)), state (10 (37 per cent)) and federal (7 (26 per cent)) levels of government.

¹⁰⁶Krysti Guest, 'The Promise of Comprehensive Native Title Settlements: The Burrup, MG-Ord and Wimmera Agreements' (Research Discussion Paper No 27, Australian Institute of Aboriginal and Torres Strait Islander Studies, October 2009).

Attachment B: AIATSIS Submission to the Native Title Organisations Review

Alternative settlement models also give rise to non-RNTBC corporate structures that fulfill similar functions to an RNTBC. Models in this category include settlements under the *Traditional Owner Settlement Act 2010* (Vic), and native title settlements such as the comprehensive South West Native Title Settlement for Noongar people in Western Australia.¹⁰⁷

Currently NTRBs/NTSPs provide support to these native title corporations alongside RNTBCs, and for regions where native title outcomes can only be generated through alternative settlement (for example the South West region of Western Australia) and where there are no RNTBCs, the NTRB/NTSP will be aiming to provide support to these corporations as other NTRBs/NTSPs do for RNTBCs in other regions. This is also clearly shown through the Federation of Victorian Traditional Owner Corporations (FVTOC) which includes both RNTBCs and traditional owner corporations. Also in the Pilbara, where many native title groups have reached agreements without a determination, Ngurra Barna, a subsidiary of Yamatji Marlpa Aboriginal Corporation (YMAC), is providing corporate services to both RNTBCs and native title corporations.

5 Releasing resources within the system through system reform

Increased support for RNTBCs places increasing pressure on other responsibilities. As noted above while the number of outstanding claims is limited, this does not necessarily lessen the workload of NTRBs/NTSPs into the future. Post determination work cannot be adequately accommodated within the existing funding envelope without significant reform to the requirements of the claim process.

AIATSIS maintains that the NTO sector requires increased resources to adapt to the increasing and increasingly diverse workload of the native title system and ensure that Aboriginal and Torres Strait Islander peoples enjoy recognised rights and interests. Our argument is premised on the ongoing claim management load that besets the system. However, it would be remiss in this Review to overlook the opportunities for redirecting funds within the system that are currently tied up with overly onerous legal tests for establishing native title. In this context, we note the pre-election commitment of the Liberal-National Party Coalition to review this aspect of native title and that the Australian Law Reform Commission inquiry into the NTA is about to get underway.¹⁰⁸ However, there are a number of reform proposals that have been explored in considerable depth and could have an indirect but significant impact on the availability and flexibility of resources. These include:

- reducing requirements of proof of native title under section 223 of the NTA;
- reducing the burden of proof by strengthening the role of inference with the introduction of a presumption of continuity; and
- reducing the burden of tenure inquiries by strengthening and broadening the provisions disregarding historical extinguishment.

¹⁰⁷ Negotiations between the parties began in 2009 following a litigation that saw a judgment that recognised Noongar people's native title over the Perth metropolitan area overturned on appeal in April 2008; *Bodney v Bennell* [2008] FCAFC 63. For agreement details see: Western Australian Government, 'The South West Settlement' (Summary Department of Premier and Cabinet, July 2013) <<http://www.dpc.wa.gov.au/lantu/MediaPublications/Documents/The%20South%20West%20Settlement-A-Summary-July-2013-Final.pdf>>.

¹⁰⁸ Australian Law Reform Commission, *Native Title Act 1993* (5 August 2013) <<http://www.alrc.gov.au/inquiries/native-title-act-1993>>.

Attachment B: AIATSIS Submission to the Native Title Organisations Review

Attachment B: AIATSIS Submission to the Native Title Organisations Review

Reducing the requirements and burden of proof

Overly stringent requirements for accepting connection have been cited as a key factor impacting on the performance of some NTRBs and their ability to focus on post determination issues.¹⁰⁹ As examined elsewhere by AIATSIS, legal concepts evolved from native title law linked to the (i) meaning of 'traditional' in relation to Aboriginal and Torres Strait Islander laws and customs; (ii) the establishment of connection by proof of continuity of cultural practice; and (iii) disputes over the scale of society in defining the native title group have involved not only untenable legal arguments but have also created undue delays in the resolution of native title claims.¹¹⁰

A number of eminent native title practitioners have suggested possible changes to section 223 that would reduce the requirements of proof and importantly, the burden of proof. For example the reforms proposed by the Chief Justice of the High Court French CJ have attracted considerable support. This proposal is colloquially referred to as 'reversing the onus', but in effect introduces a presumption of continuity of connection and laws and customs, which, rather than needing to be proved, generation by generation, would need to be positively disproved by the Crown.¹¹¹

The benefits of reducing the requirements and burden of proof led the Victorian State government and the traditional owners of Victoria to develop the alternative settlement pathway of the *Traditional Owner Settlement Act 2010* (Vic), which focuses on identifying the right people for country and does away with many of the intricate strands of inquiry under the NTA.¹¹²

¹⁰⁹For example, NQLC stated in its 2011-2012 Annual Report that 'the State of Queensland appears to adopt criteria for assessing connection which is more stringent than that which might be required in a trial. For example, the State continually asks for examples of the use of certain native title rights and the very clear implication that if those examples are not forthcoming then that right does not exist': North Queensland Land Council, *2011-2012 Annual Report* (2012), 42. Similarly, SANTS notes that commitments to fund 'ongoing litigation from its existing budget allocation' will 'severely impact on the capacity of SANTS to further progress any other matters' and the 'level of services provided to native title groups': South Australia Native Title Services, *SANTS Annual Report 2012* (2012), 32.

¹¹⁰Australian Institute of Aboriginal and Torres Strait Islander Studies, 'Submission to the Inquiry into the Native Title Amendment (Reform) Bill 2011' (Submission made by the Australian Institute of Aboriginal and Torres Strait Islander Studies, 10 August 2011); Australian Institute of Aboriginal and Torres Strait Islander Studies, 'Submission regarding the Native Title Amendment Bill 2012' (Submission made by the Australian Institute of Aboriginal and Torres Strait Islander Studies, 31 January 2013).

¹¹¹French CJ suggested three key changes to the NTA:

1. Allow an agreed statement of facts (between state and native title applicants) to be relied upon by the Court in making a consent determination (in particularly this could lift the burden of proof of continuity)
2. provide for a presumption in favour of the existence of native title
3. provide for historical extinguishment to be disregarded over classes of land where agreed by the State and Applicants.

Suggestion 1 was contained in the 2009 Amendment Bill. Suggestions 2 and 3 are contained in the 2011 Amendment Bill. See further: Justice A M North and Tina Goodwin, 'Disconnection – The Gap Between Law and Justice in Native Title: A proposal for Reform' (Paper presented at the National Native Title Conference, Melbourne, 3-5 June 2009).

¹¹²Traditional Owner Settlement Amendment Bill 2012, Explanatory memoranda. The legislation also aims to provide a process for negotiations and reaching agreement rather than stipulating the form that these agreements should take.

Attachment B: AIATSIS Submission to the Native Title Organisations Review

Reducing costs of tenure inquiries

As noted elsewhere, AIATSIS strongly supports the extension of provisions that disregard historical extinguishment, where native title rights and interests would continue to exist, but for those prior acts.¹¹³ Where historical tenure that has expired, for example where a pastoral lease has reverted to the Crown, this will still have an extinguishing effect to the extent of any inconsistency. However, in practice, where there are no other present interests in land that would extinguish native title, there is no reason why that land should not be open to a determination of exclusive possession native title. Similarly, where present interest holders are agreed, amendment to the NTA based on the proposed section 47C from the 2011 amendment bill would allow historical tenures to be disregarded and only current interests considered to determine the extent of any extinguishment.

As noted by AIATSIS, the insertion of section 47C would increase the flexibility available to parties in negotiating consent determinations. The amendment would not have a dramatic impact on the obligations of the parties, yet would save significant costs and time in determining the impacts of historical tenures. Further, it is unclear why there is a need for agreement from the Crown for extinguishment to be disregarded where the Crown is the only other potential interest holder. A further amendment should be introduced that clarifies that any unencumbered Crown land should be treated the same as land under sections 47A and 47B with automatic disregard of historical tenures.¹¹⁴

Recommendation 10: That the Commonwealth consider changes to the NTA that will increase flexibility for the deployment of resources available within the NTO system, including but not limited to:

- reducing requirements of proof of native title under section 223;
- reducing the burden of proof by strengthening the role of inference with the introduction of a presumption of continuity; and
- reducing the burden of tenure inquiries by strengthening and broadening the provisions disregarding historical extinguishment.

Government behaviour in relation to connection

Most state governments have upheld the highest possible benchmarks for the legal tests under section 223 as their own 'connection' requirements before entering into a consent determination, often to a standard greater than that imposed by the courts. While some legal complexities are inherent to the native title system, some legal thresholds (as noted above) are attracting higher transaction costs than necessary due to the approach taken by some state governments.¹¹⁵

¹¹³Australian Institute of Aboriginal and Torres Strait Islander Studies, 'Submission to the Inquiry into the Native Title Amendment (Reform) Bill 2011' (Submission made by the Australian Institute of Aboriginal and Torres Strait Islander Studies, 10 August 2011).

¹¹⁴For recommendations regarding legal reform see: Australian Institute of Aboriginal and Torres Strait Islander Studies, 'Submission regarding the Native Title Amendment Bill 2012' (Submission made by the Australian Institute of Aboriginal and Torres Strait Islander Studies, 31 January 2013).

¹¹⁵See for example North Queensland Land Council (NQLC) which noted that the following factors also influenced performance:

Attachment B: AIATSIS Submission to the Native Title Organisations Review

NTRBs/NTSPs have also noted the impact of state government capacity and acceptance of connection material as a key barrier to the resolution of claims.¹¹⁶

As a result, resolving native title by consent does not necessarily bring about timely outcomes. In an analysis carried out by the NNTT on registered determinations between 1 January 1994 and 31 December 2011, it was found that the average time frame for consent determinations was only 9 months less than litigated determinations which averaged 7 years.¹¹⁷

Federal Court and state government priorities

Broader funding decisions within the native title system also impact on the capacity of NTRBs/NTSPs to set their own priorities, including supporting RNTBCs. For example, a number of reforms and injections of funding over the past ten years have been directed at increasing the rate of resolution of claims, through increasing resources available to the Federal Court and National Native Title Tribunal in particular. In some regions, the Courts program for the dispensation of claims is the primary driver of priorities.¹¹⁸

Reforms and funding received by the Federal Court has been framed as the need to resolve disputes 'quickly inexpensively and efficiently'.¹¹⁹ Similarly, the structural and efficiency measures introduced to the native title system have sought to progress mediation under stricter direction of the Federal

-
- native title law being the subject of evolving Federal Court of Australia decisions;
 - frequent changes to reporting criteria;
 - ever changing demands of the State of Queensland and their various interpretations of case law;
 - inconsistencies of the State of Queensland from one case to another;
 - difference of the interpretation of the native title case law between different judges of the Federal Court;
 - inconsistency of approach by the NNTT to registration testing;
 - the practice of native title law exists in a constantly changing environment making orderly progression of claims difficult; and
 - availability of qualified anthropological consultants: North Queensland Land Council (NQLC), 'Annual Report' (2012), 43.

¹¹⁶Ibid.

¹¹⁷National Native Title Tribunal, *National Report: Native Title* (2012).

¹¹⁸See also for example North Queensland Land Council (NQLC) which noted that:

Our ability to respond to mediated matters, Federal Court orders, particularly involving those of an inter or intra indigenous nature in the compressed timeframes offered by the Court, is problematic and is often governed by the NQLC's ability to commission an appropriately qualified external anthropological consultant at short notice. This becomes starkly evident when the dispute is of an emergent nature and has not been provided for in the approved Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA) budget. Greater flexibility for the NQLC to develop appropriate responses on behalf of native title claimants is warranted in this area: North Queensland Land Council, *2011-2012 Annual Report* (2012), 12, 43.

¹¹⁹Patrick Anthony Keane, 'Opportunity and Responsibility' (Paper presented at the National Native Title Conference, Brisbane, 1-3 June 2011)

<<http://aiatsis.gov.au/ntru/nativetitleconference/conf2011/papers/KeaneCJ.pdf>>.

Attachment B: AIATSIS Submission to the Native Title Organisations Review

Court to bring claims to resolution.¹²⁰ Unrealistic expectations on NTRBs/NTSPs to achieve timely claims resolution are further driven by judges with limited expertise in native title who do not understand the complexities of claim management.¹²¹

Claims management is a complex process involving the framing of claims, collecting evidence and multiple and logistically intensive meetings to seek instructions from the claim group. For example the construction of the claim group may require extensive consultation at various stages of litigation. In other instances, meetings that have been planned for a considerable time, and at considerable cost, can be cancelled at short notice for cultural reasons. Preparing documents can also be difficult to settle and, once settled, difficult to have executed given the number of claimants involved. Other practical matters unique to native title need to be considered. For example, there are often few or no people capable of witnessing documents in remote or regional Australia.

The drive within the native title system for greater efficiency often ignores the interplay between the application for native title under section 61 and the impact of the Future Act regime. Unless a claim is registered the claim group is not afforded procedural rights under the NTA. In the early days of native title this led to the lodgement of claims to protect areas where development was pending. These claims were generally a triage response to protecting country and may not have been based on sound research or accurately reflect the extent of the claim area or the claim group. The cumulative impact of historical registrations continue to plague some NTRBs/NTSPs who are required to rationalise and remediate these claims under threat from the efficiency drive within the native title system. Forcing claims into a trial procedure has the potential to cause great harm to native title claim groups. It is also forcing NTRBs into deploying inadequate resources on matters which need greater time to resolve with the group, or groups involved internally.

Increased future act activity related to mining and major infrastructure projects can also impact on NTRB capacity.¹²² In some instances NTRBs/NTSPs can negotiate full cost recovery from proponents which will attract further resources. However, this type of funding is contingent on high monetary value future acts which are not experienced uniformly by all native title holders.¹²³ Without a steady and predictable revenue stream from fees for service, however, future acts must be managed alongside claims management. Some NTRBs/NTSPs identify specific future acts staff or divisions, while others incorporate future act business across activities.

¹²⁰Undertaking even the most routine step, such as having a document executed, may require 3 days of 2 or more NTRB staff. This was noted in evidence provided to the Senate Estimates (Legal and Constitutional Affairs Legislation Committee) where it was argued by Warwick Soden, a Registrar and CEO of the Federal Court:

I believe in the last decade there has been a shift in a phenomenon that I would described as being the realization that a very effective as being the realization that a very effective mediation can take place under the auspices of a judge managing the case, where the judge manages the case and makes orders in relation to the kind of mediation, the timeframe for things to done an the issues that might be dealt with in the mediation: Legal and Constitutional Affairs Legislation Committee, Senate, *Official Committee Hansard* 23 May 2012 (Warwick Soden), 95.

¹²¹For example it has been commented that a lack of appropriate judicial officers in Queensland has an impact on the disposition of claims: Legal and Constitutional Affairs Legislation Committee, Senate, *Official Committee Hansard* 29 May 2012 (Warwick Soden), 84.

¹²² A review of the workloads and staffing needs of NTRBs/NTSPs carried out in 2006 identified the support needs of these organisations: Richard Potok, 'A report into the professional development needs of Native Title Representative Body lawyers' (Final Report Castan Centre for Human Rights Law, 7 April 2005).

¹²³North Queensland Land Council, *2011-2012 Annual Report* (2012), 13.

Attachment B: AIATSIS Submission to the Native Title Organisations Review

Comprehensive infrastructure developments can also impact on NTRB/NTSP priorities. For example, the East Kimberley Development Package National Partnership Agreement (EKDP NPA) involved health, education and training infrastructure, social and employee-related transitional housing as well as community and transport infrastructure.¹²⁴ This form of NPA impacts upon the work of NTRBs who will need to advise native title holders on the impact of proposed future acts that will form a part of implementing the agreement. These future acts can include for example in the construction of infrastructure and housing. In such a situation a change in funding preferences within the native title system could promote investment in capacity building for native title groups and enable them to develop decision-making processes to respond effectively and relatively quickly to support the implementation of such agreements.

The choice, between rigidity of tied resourcing or a flexible pool approach should be based on the nature of the business of the NTRB/NTSP and the most 'efficient distribution of very limited resources'.¹²⁵ However, the choice may also be driven by strictures of the PFA arrangement, which encourage the clear delineation of expenditure against funding sources.

We also note that in addition to specific national reform to the native title sector, native title outcomes are contingent on a variety of elements including:

- jurisdictional laws and policies,
- community governance mechanisms and
- the degree and number of future act activity within a given region.

NTRBs/NTSPs are under pressure to deal with native title applications rather than future acts as there is no specific funding allocated to NTRBs for future act matters.¹²⁶ The major future acts proponents are state government agencies¹²⁷ and negotiating native title rights and interests with state and local governments is also a significant issue.¹²⁸ In some instances, the state government have funded the role of future act officers in order to ensure that post determination work is prioritised within NTRBs.¹²⁹ This funding was later withdrawn based on the perception that there is no benefit in providing financial support for that role. Ad hoc investment into the capacity of NTRBs/NTSPs to suit the needs of proponents conflicts with the ability of NTRBs/NTSPs to make choices about how funding is allocated. Responding to the priorities of external parties can also

¹²⁴ Government, Australian, *IEDS Action Plan 2010-2012 Financial Security and Independence* <http://resources.fahcsia.gov.au/IEDS/act_4.htm>.

¹²⁵ Joint Statutory Committee on Native Title and the Aboriginal and Torres Strait Islander Land Account, Perth, *Official Committee Hansard: Native Title Representative Bodies* 19 July 2005 (McMullan, Research and Policy Officer, Association of Mining and Exploration Companies).

¹²⁶ Strelein notes that it is an 'unspoken rule' that NTRBs are required to process native title applications: Lisa Strelein and Christine Regan, 'Native Title organisations: an overview of roles, resourcing and interrelationships in the post-determination context' (Research Discussion Paper AIATSIS, forthcoming). See also Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Account, *The Operation of Native Title Representative Bodies* (2006).

¹²⁷ See above discussion in section 3.

¹²⁸ NQLC noted that local governments have been withholding their consent for determinations in exchange to rectify their own wrong doings (such as the construction of infrastructure in the wrong area): North Queensland Land Council, *2011-2012 Annual Report* (2012).

¹²⁹ Joint Statutory Committee on Native Title and the Aboriginal and Torres Strait Islander Land Account, Perth, *Official Committee Hansard: Native Title Representative Bodies* 19 July 2005 (Alan John Layton, Research and Policy Officer, Association of Mining and Exploration Companies).

Attachment B: AIATSIS Submission to the Native Title Organisations Review

distort the native title representative system in favour of proponents rather than the priorities of native title holders. We will return to the specific issue of funding and support for agreement making below in section 6.

6 Agreements

There are a number of challenges associated with NTRBs/NTSPs providing support for native title groups in relation to the negotiation and implementation of agreements.¹³⁰

Subject to the wishes of each individual RNTBC, there should be greater scope for NTRBs to take on a stronger role in post-determination agreement making.

As noted above, given that the procedural rights before and after a native title determination are essentially the same (it is the structures available for taking advantage of those rights that differ as between claimants and RNTBCs), it is not clear why public funding should be focused solely on the pre-determination period. It would be a mistake to assume that the assistance needs of pre-determination claimants are any greater than those of post-determination in relation to agreement making. To base funding decisions on that assumption would risk an arbitrary allocation of resources.

The role of NTRBs/NTSPs in negotiating and monitoring agreements

If a state of underfunding persists, there is a danger that RNTBCs will not receive adequate assistance from their NTRB/NTSP in the post-determination period. Without assistance, RNTBCs will not be able to take full advantage of their procedural rights under the NTA.¹³¹ There are already too many examples where groups have been unable to secure benefits under agreement due to a lack of capacity to monitor implementation or the invoice for amounts due or to capitalise on economic opportunities.¹³² Even if funding is available from proponents or on application to the relevant Commonwealth funding body, capacity issues may affect the ability of RNTBCs to respond to future act notices within predetermined time limits, to apply for that funding, or to request the appropriate kinds of assistance and resourcing from proponents. For example the TSRA has developed an Infrastructure and Housing ILUA for each of the RNTBCs in the region that ensures that native title is managed in a similar way as freehold title. The ILUA is intended to be a 'one stop shop' for native title and is more efficient than negotiating ILUAs on a project by project basis.¹³³

¹³⁰ These have been identified by the Native Title Payments Working Group, (Report to the Australian Government, May 2012)
<http://www.dss.gov.au/sites/default/files/documents/05_2012/native_title_working_group_report.pdf>
accessed 30 September 2013.

¹³¹ O'Faircheallaigh and Corbett note the higher quality of outcomes from agreements involving an NTRB/NTSP: Ciaran O'Faircheallaigh & Tony Corbett, (2005) *Indigenous Participation in Environmental Management of Mining Projects: The Role of Negotiated Agreements*, Department of Politics and Public Policy, Griffith University, Brisbane, *Australia Environmental Politics*, Vol. 14, No. 5, 629 – 647, November 2005

¹³² Toni Bauman, Lisa Strelein and Jessica Weir (eds), *Living with native title* (forthcoming).

¹³³ Torres Strait Regional Authority, *Annual Report* (TSRA, 2012), 4.

Attachment B: AIATSIS Submission to the Native Title Organisations Review

These reasons in favour of greater NTRB/NTSP involvement in post-determination agreement-making should not be seen as supporting a mandatory role for NTRBs/NTSPs especially where RNTBCs seek to manage these affairs themselves.

Recommendation 11: That the Commonwealth investigate creating a policy flexible enough to enable greater NTRB/NTSP involvement in post-determination agreements. This should not include a mandatory role for NTRBs where RNTBCs seek to manage these affairs themselves.

The role of state and territory governments in supporting agreements

State and Territory government political and financial support for native title holders is essential to the sustainability of state/territory government agreements post determination. State government agencies are key land managers and also provide services and infrastructure on determined native title lands and can help or hinder the successful implementation of agreements.

NTRBs/NTSPs facilitating, or assisting in managing, sustainable use of benefits flowing from agreements and settlements

In addition to a general term of reference in the review relating to NTRB/NTSP involvement in managing benefits from agreements, the Reviewer was also asked to consider the Report of the Working Group on Taxation of Native Title and Traditional Owner Benefits and Governance, which recommended creating a statutory trust that would hold native title agreement funds where there was no prescribed body corporate, Indigenous Community Development Corporation entity or other appropriate funds management entity to receive them.

It is worth being explicit about what is meant by 'facilitating or assisting the sustainable use of benefits'. It could refer to one or more of the following functions:

- assisting with the negotiation and drafting of agreements to optimise the structure of benefit payments;
- assisting with the monitoring, enforcement and management of agreement implementation;
- giving advice, drafting rules and setting up structures for the distribution, investment and protection of funds; and
- involvement in decisions about what to spend money on and how it is distributed.

The range of activity for which an RNTBC may seek support from an NTRB/NTSP will differ from RNTBC to RNTBC. It is imperative that NTRBs/NTSPs should have scope to assist in managing benefits and providing advice or liaison with private providers to secure appropriate advice. Native title agreements can give rise to complex taxation and corporate governance arrangements. But, few agreements are large enough to sustain high levels of governance within the RNTBC. The management of agreements and benefits flowing from them can have a long life cycle that extends far beyond the signing of the agreement itself.

As noted above, opportunities from agreements can be lost due to a lack of capacity to monitor implementation, or lack of capacity to pursue options created under the agreement or simply through less than optimal investment decisions. Strelein noted for example, that prior to the recent

Attachment B: AIATSIS Submission to the Native Title Organisations Review

taxation reforms, there was an over-reliance on charitable trusts to manage benefits.¹³⁴ Charitable trusts ensured that the lack of clarity around taxation issues did not put the benefits at risk of erosion. However, many aspects of charitable trusts were not appropriate for the long term investment of native title benefits.

Recent changes to the *Income Tax Assessment Act 1936* (Cth) and the *Income Tax Assessment Act 1997* (Cth)¹³⁵ clarified that benefits from native title agreements are not assessable income. In addition, the introduction of the *Charities Act 2013* (Cth) ensured that the peculiarities of charities laws did not inadvertently exclude native title groups from benefiting from the taxation arrangements applicable to other charitable scenarios.¹³⁶ However, the complexity of the interplay of the tax regime and the NTA has left a further gap in the maximisation of the benefits flowing from native title, particularly for community development purposes. This gap has led the National Native Title Council to advocate for two further reforms: first the development of an alternative tax vehicle, the Indigenous community development corporation; and secondly, a statutory trust that would act as a safety net for native title groups that do not have or need the corporate structures to manage funds.

7 Recognition of NTRBs and changes to boundaries

Culturally appropriate institutions are essential for successful governance.¹³⁷ We submit that NTRBs/NTSPs have attained a degree of cultural proficiency that enables them to perform their functions to a high level. They act as not only intermediaries but also have community knowledge and contextual experience that can assist in the resolution of claims. This expertise is reflected in their continuing recognition.¹³⁸ NTRBs/NTSPs understand the Indigenous context in which decisions about use and distribution of funds are located. In addition, an understanding of local group dynamics may better place NTRB/NTSP or subsidiary structures to ensure that agreements maximise benefit native title holders. On the other hand, NTRB/NTSPs may not want to take on this role as the expertise involved is highly specialised and the work load could be significant.

¹³⁴ Lisa Strelein, 2008, *Taxation of Native Title Agreements, Research Monograph 1/2008*, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra.

¹³⁵ Tax Laws Amendment (2012 Measures No. 6) Bill 2012.

¹³⁶ *Charities (Consequential Amendments and Transitional Provisions) Act 2013*(Cth), schedule 1 (item 44).

¹³⁷ In its Inquiry, the House Standing Committee on Aboriginal and Torres Strait Islander Affairs drew from the Harvard project on American Indian Economic Development and noted that culturally appropriate institutions are key to the 'success' of Indigenous organisations: House Standing Committee on Aboriginal and Torres Strait Islander Affairs, House of Representatives, Canberra, *Many Ways Forward: Report of the inquiry into capacity building and service delivery in Indigenous Communities* (2004).

¹³⁸ The re-recognition of NTRBs with community and pre-native title history reflects this. During the 2007 reforms to NTRBs announced by the then Minister for Indigenous Affairs Mal Brough, the Kimberley Land Council, Northern Land Council, Central Land Council, North Queensland Land Council and Torres Strait Regional Authority were re-recognised for six years. At the same time, many of the Queensland based land councils were amalgamated while Ngaanyatjarra Council and Aboriginal Legal Rights Movement transitioned into service providers: The Hon Mal Brough MP, *Reforms to Native Title Representative Bodies to benefit Indigenous Australians*, media release, Canberra, 7 June 2007 <http://www.formerministers.fahcsia.gov.au/3512/ntrb_7jun07/>.

Attachment B: AIATSIS Submission to the Native Title Organisations Review

The political origins of NTRBs that have evolved from community organisations has impacted on the constitution of different NTRBs/NTSPs corporate and governance structures. Six out of 15 representative organisations are funded under s 203FE(1) of the NTA to perform functions for specific areas.¹³⁹ The diversity of native title organisations that suit the needs of their constituencies should be enabled rather than undermined. We submit that ongoing flexibility in the governance and representation arrangements available to NTRBs/NTSPs would continue to ensure this diversity.

In March 2012 the long awaited RNTBC peak body for the Torres Strait was finally established with the ORIC registration of the Gur A BaradharawKod Torres Strait Sea and Land Council Torres Strait Islander Corporation. The idea for the Sea and Land Council emerged in response to a perceived inflexibility of the existing institutions (the TSRA and the TSIRC) and their inability to accommodate RNTBCs and traditional land ownership within the regional governing framework. The Sea and Land Council has clear intentions to transfer the functions at least of the TSRA NTO/NTRB (itself six staff and \$1.6 million operating budget in 2009–10) and eventually of the TSRA Land and Sea Management Unit, largely funded through the Australian government's Caring for Country programs. The TSRA moved towards accepting the idea of a new body as a necessary development to avoid the growing conflict between the TSRA and the legal interests of the RNTBCs. To this end, the TSRA (through its NTO) made a submission to the Commonwealth review of native title funding that contemplated the emergence of a regional traditional owner body in 2008.¹⁴⁰ A Memorandum of Understanding (MOU) between the TSRA and the Sea and Land Council has not eventuated, however in December 2012 the TSRA Board agreed to support the transfer of the NTRB functions to the newly established Gur A BaradharawKod Torres Strait Sea and Land Council.¹⁴¹

The Torres Strait example illustrates the need to consider how the role of NTRBs/NTSPs would evolve further upon the conclusion of the native title claims process. However, as noted above in section 1.1 there continues to be an interdependent relationship between the need for RNTBCs to negotiate and assert their native title rights and interests and the expertise and knowledge of NTRBs and NTSPs.

ationalisation has traditionally been a matter of efficiency. As noted by the then minister for Indigenous Affairs, Mal Brough, rationalisation aimed to address the 'serious administrative and financial difficulties significantly affecting [NTRB] capacity to resolve native title claims' and the 'large backlog of native title claims across Australia...creat[ing] uncertainty not only for Indigenous people but business and government'.¹⁴² Some of these changes introduced in 2007 – 2008 created significant pressure on large NTRBs/NTSPs like QSNTS. QSNTS has noted that the organisation spent 'a considerable amount of time and resources rectifying the mistakes and omissions of the past'.¹⁴³

¹³⁹These bodies are Central Desert Native Title Services, South Australian Native title Services, Carpentaria Land Council Aboriginal Corporation, Queensland South Native Title Services (since 2005 and amalgamated the former Gurang region and the greater Mt Isa portion of the former Carpentaria region in 2008) and NTSCorp and Native title Services Victoria. There are currently 17 recognised representative Aboriginal/Torres Strait Islander Body Areas represented by 15 organisations funded to perform native title functions.

¹⁴⁰ Recommended at Masig PBC meeting, 2008. TSRA, 'Submission to the Commonwealth review of native title funding', unpublished submission, Torres Strait Regional Authority, 2008.

¹⁴¹ Maluwap Nona, TSRA Board member and native title portfolio holder, pers. comm., 16 November 2012.

¹⁴² The Hon Mal Brough MP, *Reforms to Native Title Representative Bodies to benefit Indigenous Australians*, media release, Canberra, 7 June 2007 <http://www.formerministers.fahcsia.gov.au/3512/ntrb_7jun07/>.

¹⁴³ This was attributed to a Departmental Spokesperson: QSNTS, *Evidence-based native title approach endorsed by experts and traditional owners*, online news, 30 April 2012, <<http://www.qsnts.com.au/index.cfm?contentID=23>>.

Attachment B: AIATSIS Submission to the Native Title Organisations Review

There are also limitations to cross-border amalgamations given the diversity of policy and practice at the state and territory level. In contrast, there may be arguments in the future for decoupling some regions or establishing sub-regional structures based on cultural blocs.

8 Private Agents

Private consultants have been a significant factor within the native title system since the outset. NTRBs/NTSPs, state and Commonwealth governments regularly employ consultant researchers and legal representatives to carry out work on their behalf. NTRBs/NTSPs have also on occasion, funded external representation in circumstances where conflicts exist between claimant groups.¹⁴⁴ However, recently there have been increasing concerns raised over the conduct of private agents.

The Working Group on Taxation of Native Title and Traditional Owner Benefits and Governance Report recommended regulating private agents involved in negotiating native title future act agreements. AIATSIS appreciates the need to address the significance of these stakeholders but also notes that any measures adopted should take into consideration the unique and specialist nature of native title claims research and likewise, legal practice. On the whole, the regulation of private agents should be supported by activities that build a better informed native title consumer base, including for example, greater information about the trust relationship between native title applicants and the native title group, particularly where funds are received on behalf of the group. The Australia Securities Information Commission and Australian Consumer Competition Commission may have models that could be adapted to the native title sector. Given options for regulation via professional bodies, we will deal with these issues according to their relevant general field of practice.

Lawyers and barristers acting as private agents

The issue of lawyers and barristers acting as private agents has beset the native title space for many years, mainly in areas where there is high level of mining activity. Colloquially the private agents are referred to as “rogue lawyers”, by many in the native title sector, as they are unregulated, unsupervised and are often perceived as acting out of self-interest rather than the best interests of the claim groups they represent. That said there are clearly many well trained and experienced private agents who act in the best interests of their clients, but even those lawyers are not bound by the same political and cultural constraints facing NTRBs/NTSPs.

The private agent lawyers are involved both in applications for a determination of native title and in future act and cultural heritage matters.

There is a tension between affording a claim group the right to choose its own representation and ensuring that the orderly business of a NTRB/NTSP is maintained and the claim group is fairly and appropriately represented. We understand that in some instances claim groups do not wish to be represented by NTRBs/NTSPs, or for other reasons the NTRB/NTSP are unable to represent them.

¹⁴⁴ In 2011 – 2012, QSNTS spent a total of 22 per cent of its budget on anthropological or legal consultants. The NQLC spent a total of 7 per cent of its budget on anthropological or legal consultants; TSRA 27 per cent. NTSV spent 13.6 per cent of its budget on legal and research consultants but has explicitly stated an intention to build in house capacity to areas of economic and community development: Native Title Services Victoria, 'Annual Report' (2012) 32, 36, SANTS spent a total of 28 per cent of its FaHCSIA budget on consultancies, South Australia Native Title Services, *SANTS Annual Report 2012* (2012), 38.

Attachment B: AIATSIS Submission to the Native Title Organisations Review

There is frustration amongst many claim groups about the delays in having native title applications lodged and then prosecuted in a timely manner. The reasons for the delays are many and often outside the control of the NTRBs/NTSPs, including:

- NTRBs/NTSPs have insufficient funding to deal with all matters simultaneously. Similarly the various State Governments are under resourced in this area so that even if the NTRBs/NTSPs could prosecute all of its claims it is unlikely that the State would have the capacity to respond. The Federal Court acknowledges the large number of cases awaiting resolution and conducts Case Management Conferences (CMC) twice a year with the representatives of each claim group in a given area. The CMC's give the Court the opportunity to assess the progress of each case and its readiness for trial. In Western Australia the State acknowledges the huge workload the parties are facing and the State and the NTRBs/NTSPs meet before the CMCs to identify which matters should progress and to set timetables to ensure the orderly progress of all claims. Given the backlog of cases in the Court delays can be considerable.
- In the scheduling of matters for the CMC NTRBs/NTSPs are required to prioritise each claim on its merits. Factors which affect this prioritisation may include the level of mining activity in a particular area, the level of disputation within a group, the demographics of a claim group, the length of time a group's application has been on foot and the level of available resources which may support a claim (for example, historical and anthropological material, or the availability of anthropologists familiar with the claim area).
- If there is disputation within a group or disputed boundaries it is unwise to proceed to litigation unless and until those issues are resolved. Native title disputes can often take years to resolve.

If a claim group is unhappy with the delays or its prioritisation level it may become disenchanted with the NTRB/NTSP and seek assistance from a private agent. A claim group seeking to progress its claim can only fund its claim through either government funding, which is administered by the NTRB/NTSP, or by drawing on private funding. If the NTRB/NTSP maintains the priority level then it is unlikely that the claim group will receive funding through the NTRB/NTSP.

Claim groups which self-fund, often do so by drawing on funds received (or likely to be received) through mining royalties. This raises a number of potential issues:

- Funds received from mining companies are usually earmarked for community purposes (including for example, education, training, health, cultural observance and land management). If those funds are diverted from the group then many of the opportunities for the advancement of the claim group may be lost.
- There is considerable anecdotal evidence that private agents often promise to represent these groups on a 'pro bono' basis. However, it is common practice for the lawyer to act without fees until mining funding 'starts to flow'.
- There is also considerable anecdotal evidence of mining companies exploiting the disenchantment of a group. There are numerous examples of companies assisting disenchanted, disunited or otherwise unrepresented claim groups by providing funding or resources to a group to hold meetings, or providing resources to the group or targeted individuals, providing transport to meetings (particularly to bolster numbers at a contentious meeting) and even funding legal representation of a private agent lawyer. The effect, if not the purpose, of this is to jeopardize the standing and effectiveness of NTRBs/NTSPs not just within that group but in the wider representative area.

Where a group engages a private agent it can significantly impact on the operations of an NTRB/NTSP. A private agent acting for a claim group acts for that claim group in isolation. Even

Attachment B: AIATSIS Submission to the Native Title Organisations Review

though each claim group is, for the purposes of native title determination, a separate claim group, in reality every claim group has close familial or cultural ties with surrounding claim groups. NTRBs/NTSPs must take a global approach to the prosecution of claims. Inter-group politics requires the NTRB/NTSP to tread a fine line to maintain community relationships particularly in remote communities. The private agent has no such obligation, or indeed is probably unaware of those dynamics.

Further, private agents are not always proficient in native title law and may unwittingly create both intra and inter claim group disputes. If a claim group is wrongly defined, in terms of the composition of the claim group, it can fracture the group and set back the progress of that claim for many years or create serious disputes between families. If the claim description is incorrect, in terms of the area claimed, it may lead to the lodgement of overlapping claims thereby causing inter-group disputes and lengthy litigation. In each case the NTRB must divert funds and resources to deal with these issues by, for example, exercising its mediation functions to resolve intra group disputes or representing claimants affected by overlaps. Where there is clear prioritisation of claims based on resources and needs, any disruption to this programme can have significant flow on effects and impact on the capacity and resources of NTRBs/NTSPs.

There is considerable anecdotal evidence of private agents acting for claim groups in relation to future act and cultural heritage matters with little or no experience in native title law or in complex negotiations. This has resulted in insufficient protections or benefits for traditional owners. We submit that private agents should be required to have a level of competence that can be objectively assessed.

Similarly, many private agents do not have the resources to organise and hold claim group meetings. Whilst legal representatives are only required to deal, in the first instance, with the named applicants, any future act which affects native title requires endorsement by the whole claim group.¹⁴⁵ An over-riding principle in all native title related matters is that decisions should only be made with free, prior and informed consent. Where private agents are unable to hold a properly constituted meeting the whole process is undermined.

In relation to intra group disputes a private agent will often be engaged by the dominant group (perhaps the majority of applicants) contrary to the wishes of the minority. In some cases the private lawyer considers that the majority applicants constitute the client rather than the whole claim group or even the whole applicant group.¹⁴⁶ Private agents should adhere to the same legal obligations and service standards that are imposed on NTRBs/NTSPs through the NTA and PFAs. For example, any private agent engaged to prepare and prosecute an application for a determination of native title or negotiating ILUAs should be bound by the requirements under the NTA to act in the interests of the entire claim group under section 203B(4) of the NTA.

Recommendation 12: That private agent lawyers be required to have an objective level of competency. It is recommended that a registration system akin to the certification of Migration Agents be investigated.

Recommendation 13: That private agents be required to adhere to the same legal obligations and service standards that are imposed on NTRBs/NTSPs. It is recommended that the various State or

¹⁴⁵ NTA, s 24CG(3).

¹⁴⁶ See for example *Tigan v Western Australia* [2010] FCA 993.

Attachment B: AIATSIS Submission to the Native Title Organisations Review

Territory Law Societies introduce codes of conduct regulating the special ethical considerations applicable in native title matters.

Anthropologists acting as private agents

The comments that follow relate specifically to private agents who conduct anthropological and related research for native title claims who are not engaged through NTRBs/NTSPs. The Reviewer seeks comment on whether establishing a system of professional regulation will assist to reduce instances where anthropologists engaged outside of NTRBs undermine the successful progress of native title claims by providing unsubstantiated reports or testimony. They also seek input on the costs and benefits of such regulation.

Based on recent research into the feasibility of establishing a system of accreditation for native title anthropologists conducted by associates of the Centre for Native Title Anthropology (CNTA) at the Australian National University (ANU), we suggest that although regulation of native title anthropologists is desirable, it would not be possible without a considerable investment of funds to establish an independent regulating agency.¹⁴⁷

We suggest that the high costs associated with establishing an independent regulating agency specifically for native title anthropologists would be enormously disproportionate to the very small number of individuals such an organisation would ultimately regulate. We suggest that a more effective strategy to reduce the impact of 'rogue' native title anthropologists would be to allocate funds to improving client awareness of private agents and the standards of best practice that native title claimants should expect from them.

Regulation of applied anthropologists has been previously attempted in Australia but has failed for a number of reasons. Similar efforts internationally have also failed.¹⁴⁸ A significant challenge to establishing effective regulation is the very small number of consultant anthropologists operating in Australia. There are no firm figures about the number of anthropologists who currently undertake native title related work, but estimates based on involvement in various professional networks put the figure at between 80 and 120.¹⁴⁹

¹⁴⁷Centre for Native Title Anthropology Project, 'Final Report Program Activities 2010-2011' (unpublished report to the Attorney-General's Department, Centre for Native Title Anthropology, Australian National University, Canberra, December 2010) 34.

¹⁴⁸Pamela Faye McGrath, 'A recent history of the professionalisation of Australian applied anthropology and its relevance to native title practice' (2012) 1 *Australian Aboriginal Studies* 63. In the 1980s both the British and American anthropological associations investigated establishing accreditation schemes and ultimately both organisations decided against it.

¹⁴⁹In 2004 research by David Martin into the capacity of native title anthropologists found that fewer than 20 of the more than 100 anthropologists working in Australian universities were actively engaged in native title practice. At the time there was a total of 45 staff native title anthropologist positions within NTRBs nationwide, and probably fewer than 20 anthropologists are employed in government agencies in relation to native title issue: David Martin, 'The capacity of anthropologists in native title research' (report to National Native Title Tribunal, Anthropolos Consulting Services, Canberra, 2004) 6, <<http://www.nntt.gov.au/Mediation-and-agreement-making-services/Documents/Capacity%20of%20Anthropologists%20in%20Native%20Title%20Practice.pdf>>, accessed 30 July 2013). Two years ago the number of anthropologists specialising in Aboriginal and Torres Strait Islander studies was estimated to be around 90; not all of these individuals were involved in research for native title claims: Paul Burke, *The Law's Anthropology* (ANU E Press, Canberra, 2011) 9. More recently, an informal

Attachment B: AIATSIS Submission to the Native Title Organisations Review

Regulating private agent native title anthropologists through an existing professional body is also not a viable option. In Australia, the national organisation representing the interests of anthropologists is the Australian Anthropological Society (AAS). Membership is not mandatory, and not all anthropologists based in Australia are members.¹⁵⁰ Like most other anthropological societies around the world, it is a not-for-profit organisation managed by volunteers, and services the interests of a diversity of disciplinary specialisations. The AAS has a membership of over 600, less than 20 of whom identify themselves on the Society's membership pages as being involved in native title research.

The Society has a voluntary code of ethics that is not legally binding. There is currently no mechanism for the AAS to action and adjudicate a complaint about a breach of the code of ethics. The code of ethics acts as an authoritative guideline only. Membership of the AAS cannot be held to imply any legal warranty of competence equivalent to that of doctors or lawyers, and the Society has no capacity to regulate the behaviour of its members.¹⁵¹

During early 2011, Dr Pamela McGrath undertook research into professionalisation among Australian applied anthropologists and options for establishing a professional accrediting organisation for native title practitioners in particular. The research involved consultations with individuals and organisations who had participated in previous efforts towards establishing an accreditation scheme, including past and present members of the Australian Anthropological Society (AAS), the Anthropological Society of Western Australia (ASWA) and the Anthropological Society of South Australia (ASSA).¹⁵² Research was also undertaken into the experiences of other professions when implementing accreditation regimes, most notably that of the recent establishment of national standards and accreditation for mediators and dispute resolution practitioners.¹⁵³

The vast majority of practitioners consulted for the CNTA research project were not in favour of pursuing accreditation for native title anthropologists or applied anthropologists more generally. Key impediments to accreditation included:

- the small number of practitioners relative to the likely high costs of designing, implementing and maintaining an accreditation regime
- the cost and complexity of achieving sector-wide agreement among funders, practitioners and Indigenous stakeholders on appropriate qualifications and standards of accreditation for native title anthropological research
- the cost and legal complexities associated with ensuring compliance, adjudicating possible breaches and enforcing penalties
- level of risk associated with possibility of disgruntled practitioners taking legal action following a refusal to accredit or administering remedial action.

comparison of professional networks maintained by AIATSIS, CNTA and Australian Native Title Studies at the University of Adelaide suggests that there are around 120 individuals either interested in or currently practicing native title anthropology.

¹⁵⁰ David Martin et. Al, 'Overview', in *Expert Evidence*, Thomson Reuters, Pyrmont, NSW, Update 69, 36-2053.

¹⁵¹ *ibid.*

¹⁵² Aspects of this research have been published in: Pamela Faye McGrath, 'A recent history of the professionalisation of Australian applied anthropology and its relevance to native title practice' (2012) 1 *Australian Aboriginal Studies* 63.

¹⁵³ For more information on the history of the establishment of the Mediators Standards Board, see <http://www.msb.org.au/sites/default/files/documents/A%20History%20of%20the%20Development%20of%20the%20Standards.pdf>, accessed 30 July 2013.

Attachment B: AIATSIS Submission to the Native Title Organisations Review

A significant concern raised by McGrath's research was that accreditation for native title anthropologists would only be feasible if the organisations that employ native title anthropologists, or who fund others to employ native title anthropologists, are prepared to commit to only employing accredited practitioners. For the system to work, this would involve establishing buy-in from multiple stakeholders, including: Commonwealth, state and territory governments; local governments; resource extraction companies; NTRBs, NTSPs and RNTBCs; private law firms; other Aboriginal organisations such as land councils and Aboriginal shires; and respondent party representatives such as the Pastoralist and Grazer's Association and the Minerals Council of Australia. The costs involved in negotiating agreement across all these stakeholders would be extraordinary relative to small number of practitioners it would ultimately regulate.

Those anthropologists consulted for the CNTA research project generally felt that providing more and better targeted professional development opportunities would be more effective in improving standards of research for native title claims.¹⁵⁴

In the case of anthropologists, an alternative approach to regulating the private agent would be to regulate the products of their research. By that we mean developing more rigorous strategies to better ensure the reliability and quality of material authored by anthropologists for use in native title proceedings. Such strategies might include the establishment of basic requirements for research methodology and reporting, for example: minimum standards for recording of informant interviews; reporting of all research activities informing opinion; and provision of comprehensive bibliographies.

Mandatory and anonymous peer review may also improve the quality of reports prepared for use in native title hearings or mediations. Peer review is widely accepted in all disciplines of the academy as fundamental to ensuring the quality of research outputs. Peer review of reports was widely adopted by Northern Territory land councils in the preparation of claim books in Land Rights Act claims and is used by some NTRBs for native title claims.¹⁵⁵ Mandating peer review for all anthropological reports prepared for use in native title claims (both in mediation and litigation) could be achieved either through making it a requirement of government funding grants or through specific Practice Directions.

Recommendation 14: That the Commonwealth and key stakeholders engage in consultations to develop strategies aimed at:

- educating clients on the roles and standards of private agent native title anthropologists; and
- regulating the quality of anthropological reports for native title claims (eg mandatory independent peer review) be investigated and implemented.

¹⁵⁴ Pamela Faye McGrath, 'A recent history of the professionalisation of Australian applied anthropology and its relevance to native title practice' (2012) 1 *Australian Aboriginal Studies* 72.

¹⁵⁵ The issue of ethical behaviour in native title research is examined in detail in a recent update to the Thomson Reuters' volume on *Expert Evidence*, see P Burke, 'Anthropologist as expert witness in native title hearings', in *Expert Evidence*, Thomson Reuters, Pyrmont, NSW, Update 69, 7051-62

Attachment B: AIATSIS Submission to the Native Title Organisations Review

Heritage professionals (including archaeologists) acting as private agents

AIATSIS is concerned about the large number of anecdotal reports of unethical conduct on the part of cultural heritage advisors who reportedly collude with other private agents and company representatives to rubber stamp cultural heritage assessments and community authorisation processes associated with future act agreements. The recent high profile case of role of heritage practitioners in the conflict between Yindjibarndi Aboriginal Corporation (YAC) and Fortescue Metals Group (FMG) over destructions of sacred sites in the Pilbara region of Western Australia is a recent example of the implication of private agent heritage professionals in future act issues.¹⁵⁶

Professionals who undertake cultural heritage assessments for development projects may include experts in the disciplines of archaeology, anthropology, Indigenous heritage or history. Anecdotally, many others without relevant qualifications also conduct cultural heritage assessments. Heritage practitioners may act as private agents, or be directly employed by organisations such as NTRBs/NTSPs, government or resource development companies.

Although establishing regulation or accreditation for cultural heritage advisors will likely encounter some of the same challenges as regulation for native title anthropologists, the larger number of cultural heritage practitioners working across Australia may in fact make regulation in this particular area of professional practice a viable proposition.¹⁵⁷

One of the greatest hurdles to the regulation of cultural heritage practitioners is the fact that matters relating to Indigenous cultural heritage are primarily managed through state rather than commonwealth legislation. However, regulation of cultural heritage advisors has been achieved in Victoria, which may serve as a model for regulation of heritage professionals in other states.¹⁵⁸

Victoria has implemented legislation which prescribes requirements for appropriate qualifications and expertise for Indigenous cultural heritage advisors. Section 189(1) of the *Aboriginal Heritage Act 2006* (VIC) describes the requirements a person must meet in order to be engaged as a Cultural Heritage Advisor. Specifically,

- (1) A person may only be engaged as a Cultural Heritage Advisor under this Act if the person—
 - (a) is appropriately qualified in a discipline directly relevant to the management of Aboriginal cultural heritage, such as anthropology, archaeology or history; or
 - (b) has extensive experience or knowledge in relation to the management of Aboriginal cultural heritage

¹⁵⁶See ABC 7:30 Report, *Conflicting information, interests and land owners dog FMG*, 20 Nov 2012, <<http://www.abc.net.au/7.30/content/2012/s3637169.htm>>, accessed 13 September 2013.

¹⁵⁷The combined numbers of various professionals who undertake in cultural heritage assessments for native title related projects is unknown, but is undoubtedly far greater than that of native title anthropologists alone due to the large number of sites being recorded on state and territory heritage registers in response to development applications. See Eloise Schnierer, Sylvie Ellsmore and Stephan Schnierer, *State of Indigenous cultural heritage 2011* (report prepared for the Australian Government Department of Sustainability, Environment, Water, Population and Communities on behalf of the State of the Environment 2011 Committee, Canberra, 2011) 51-59.

¹⁵⁸See Department of Premier and Cabinet, 'Cultural heritage advisors', last updated 20 August 2013, <<http://www.dpc.vic.gov.au/index.php/aboriginal-affairs/aboriginal-cultural-heritage/cultural-heritage-advisors>> accessed 13 September 2013.

Attachment B: AIATSIS Submission to the Native Title Organisations Review

The Minister of Aboriginal Affairs has subsequently established guidelines specifying what constitutes 'appropriate qualifications' for the purposes of section 189(1)(a) of the Act.¹⁵⁹ These include specific qualifications and membership of professional organisations.

AIATSIS acknowledges that the development, implementation and ongoing management of Commonwealth legislation to oversee the regulation of heritage advisors around the country would be a complex and costly exercise. Nevertheless, it is an idea worthy of further exploration and discussion with stakeholders including: NTRBs/NTSPs, RNTBCs, AIATSIS, professional organisations (such as the Indigenous Archaeologists Association, the AAS, the Australian Archaeological Association, Australian Association of Consulting Archaeologists), state governments, and resource extraction companies.

The establishment of agreed national standards for the practice of development-related heritage assessments on native title lands would also, we suggest, assist to reduce instances where private agents and others to engage in unconscionable conduct of the kind that undermines the capacity of native title groups to manage and protect their cultural heritage or leverage their native title rights and interests for economic development. These standards could be based on the Australian Heritage Commission's *Ask First* Guidelines, a detailed and practical guide for land developers, land users and managers, and heritage professionals.¹⁶⁰ Greater promotion of these guidelines would be a first step to improving clients' understanding of what constitutes good practice in Indigenous cultural heritage assessment and the standards of practice they should expect from private agents.

Recommendation 15: That the Commonwealth and key stakeholders engage in consultations aimed at regulating Indigenous cultural heritage advisors and establishing national standards for qualifications and expertise. In the interim, we recommend that the *Ask First* guidelines be better promoted among native title groups, proponents and heritage advisors.

9 Conclusion

The incoming Minister for Indigenous Affairs, Senator, the Hon Nigel Scullion, addressed the National Native Title Conference in Alice Springs, arguing that there was a need to support native title post determination how to make the most of converting recognition 'into meaningful practical benefits for traditional owners [and] [i]ntegrating native title into the governance of the regions'.¹⁶¹

This submission is based on a primary underlying principle that Indigenous peoples have a right to own and inherit their traditional territories; to make decisions about, and benefit from, their traditional territories and resources; as well as to maintain their culture. Secondly, with the focus of the Review being on NTOs, the observations in this submission are based on the principle that Indigenous peoples should be free to make informed choices as to how they govern themselves to deliver outcomes in land management, economic development and cultural maintenance. As such,

¹⁵⁹ Ibid.

¹⁶⁰ Australian Heritage Commission, *Ask First: A guide to respecting Indigenous heritage places and values*. <<http://www.environment.gov.au/heritage/ahc/publications/commission/books/pubs/ask-first.pdf>> accessed 24 September 2013.

¹⁶¹ Nigel Scullion, 'Speech to the National Native Title Conference, Alice Springs' (Speech delivered at the National Native Title Conference, Alice Springs, 5 June 2013) <<http://www.nigelscullion.com/media-hub/indigenous-affairs/speech-national-native-title-conference-alice-springs>>.

Attachment B: AIATSIS Submission to the Native Title Organisations Review

it is AIATSIS' view that the legislative and regulatory framework should be enabling and not unnecessarily prescriptive.

If the native title system is viewed from the perspective of empowering native title holders to make decision for and benefit from their traditional country, then the structuring of processes and allocation of resources within the system may be viewed differently. Further the system itself requires flexibility to account for the diversity of the native title sector not only in terms of its current functions but also future aspirations in order to ensure that legal recognition achieves associated social and economic outcomes that are fundamental to the development of Indigenous peoples.

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Attachment B: AIATSIS Submission to the Native Title Organisations Review**Appendix A: methodology and PBC survey data**

Between March and August 2013, AIATSIS undertook a nation-wide survey of PBCs. At the time of this submission 27 PBCs had responded to the survey. The results reported in this submission are preliminary but reliable and, we suggest, are broadly indicative of the circumstances of RNTBCs around the country. Additional findings from this research will be published in the future.

Table 1 (below) shows the number and location of respondents and compares this to national figures. The sample surveyed so far are fairly representative of the national distribution of PBCs by State/Territory location, with the notable exception the Northern Territory where no PBCs have yet responded to the survey. Table 2 shows that the sample is also fairly representative of the national distribution by size of organisation as classified under the CATSI Act.

Table 1. RNTBCs participating in the 2013 AIATSIS PBC Survey, by State/Territory

State/Territory	RNTBCs participating (No.)	RNTBCs participating (%)	National RNTBCs as at 14 August 2013 (No.)	National RNTBCs as at 14 August 2013 (%)
NSW	1	4	2	2
NT	0	0	15	13
QLD	5	19	36	32
TSI	8	30	19	17
SA	4	15	10	9
VIC	1	4	4	4
WA	8	30	27	24
Total	26	100	113	100

Table 2. RNTBCs participating in the 2013 AIATSIS PBC Survey, by Size

Size	RNTBCs participating (No.)	RNTBCs participating (%)	National RNTBCs as at 30 June 2012 (No.)	National RNTBCs as at 30 June 2012 (%)
Small	20	74	77	82
Medium	5	19	15	16
Large	2	7	2	2
Total	27	100	94	100