

# BEYOND THE RE-RECOGNITION PROCESS

## CHALLENGES AHEAD for ATSIC and NTRBs

Acknowledgement of Traditional Owners

Thanks to Conveners of Conference

Paper by

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### Introduction

Since the historic High Court *Mabo* decision in 1993, which confirmed the existence of Native Title existing in Australia, successive Commonwealth Governments have codified and then amended the Native Title Act 1993 as a legislative response to the High Court decision.

As a consequence of the 1998 Amendments a number of significant changes in the Native Title system, these include:

- Upgrading the “Registration Test” requirements
- Authorising the passage (in various forms), State Native Title Regimes, including complimentary Validation of Extinguishment legislation for a wide range of State based land tenures – cited Qld example where legislation used to extinguish NT over 12% of State, by including GHPL/GHFLs as valid extinguishing state land tenure
- Enhancing the roles and responsibilities (with additional resources) of the Federal Court and National Native Title Tribunal
- Much more onerous accountability and Statutory reporting requirements for NTRBs, with no corresponding resource increase

The amendments also required a complete Re-recognition process for all existing NTRBs in the country, this entailed ATSIC Native Title and Land Rights Centre, in its unique role as adviser to the Commonwealth Minister, being responsible for an exhaustive and resource intensive process of seeking “Invitations”, for the amended NTRB boundaries. Then followed a draining assessment process, not only for affected NTRBs, but also for ATSIC, where the total cost of the process was in the vicinity of \$1-2 million, with no additional funding provided by the Govt.

The sheer volume of litigation relating to the *NTA* provisions and their operations, highlights just how new and different Native Title law is in Australia, at the core of this unprecedented legal moray were NTRBs, which are effectively Aboriginal community controlled organizations trying to deal with the intense resource needs of a litigation based regime.

## **Increased Statutory Responsibilities of NTRBs**

- Must submit Strategic Plans for determined period Ministerial approval
- Must submit Annual Reports for presentation to Commonwealth Parliament
- Subject to Administrative Decisions Judicial Review Act provisions
- More Onerous Representativeness requirements for Governing Committees

## **NTRB status and being an Indigenous community controlled organisation**

The range in terms of, organisational operational experience, cultural difference, organisational structures and (pre NTRB recognition) existing statutory responsibilities of Indigenous Corporations now recognised, as NTRBs is significant. With the NLC and CLC having had Commonwealth statutory authority status and the associated accountability standards since the commencement of the *Northern Territory Land Rights Act (Cth) 1976*, to the relatively new Corporations like Yamatji Land and Sea Council, Carpentaria Land Council, and Mirimbiak which have comparatively have limited organisational operational experience as bodies with extended statutory responsibilities and accountability.

NTRBs constituencies vary just as much, with some NTRBs working solely with remote traditional owner groups, and others having urban and regional constituents, as well as a further (3) three having Statewide responsibilities. The voting membership of NTRBs varies greatly from several hundred through to total membership in excess of many thousand in others. These greatly varying constituency factors, when combined with external factors like the policy of respective State and Territory governments, the significantly increased role of both the NNTT and the Federal Court in the NT system. As well as mining and development pressures prevailing in the various NTRB areas. These collectively impact significantly on the manner and capacity in which NTRBs provide their respective Native Title Service delivery.

The ability of NTRBs to provide a stable safe, career oriented employment environment is also influenced greatly by a combination of all of the above factors as well as the resource needs both in fiscal and people terms in determining the potential and capacity operational effectiveness of NTRBs. The fact that all NTRBs are Indigenous community controlled organizations is also significant, as by their sheer existence, they are within the Indigenous community, one of the most important and powerful Indigenous bodies in their respective States or Regions. This effectively means NTRBs operations and decision-making processes are the most publicly scrutinised of Corporations with Commonwealth statutory responsibilities.

## **Potential Litigation Workload**

There are currently some 588 Native Title claim applications within the NNTT/Federal Court system, in the context of the litigation process in this country, this is surely an improbable judicial workload. Given the anecdotal evidence of the total legal, and therefore community costs, of litigation like the *Mabo*, *Wik*, and *Yorta Yorta* cases it is vital a sense of reason and fair play prevail

in the management of NT Claimant Applications in this country. It would be unjust if NT Claim applications are dismissed or struck out because of insufficient legal preparation, it is clear that the High Court has continued to recognise and expand on its historic *Mabo* decision, and the judicial importance of forthcoming decisions in *Merrimong Gajjerong*, *Croker Island*, *Wilson v Anderson and Yorta Yorta* will provide important legal precedents and principles as the direction of Native Title law is determined in this country.

## **Importance of the role of NT Claimant Groups, NTRBs, Anthros and Lawyers**

### NT Claimant Groups

- NT Claimant groups are the essential element of the NT system as it operates today, they are in effect the instructing parties in a litigation based regime
- NT Claimant groups are entitled to and deserve the best possible legal outcomes from NT recognition
- NT Claimant groups have to be empowered to have the capacity to represent, negotiate and retain their own cultural identity, whilst meeting the system enforced structures which are imposed, and in all cases are at least in some part, contradictory to Indigenous culture
- NT Claimant groups see NT recognition as part of a range of essential opportunities to create more culturally appropriate care of country programs, as well as genuine community development options
- NT Claimant groups must have inclusive, transparent and culturally appropriate measures to ensure any NT benefits and outcomes, which may be achieved, are shared in the true communal nature of just what NT is.
- NT Claimant groups must have in place effective feedback and accountability mechanisms to ensure elected/nominated representatives are capable of and do actually report back to the wider group in a transparent manner

- Anthropologists

### Professional and ethical obligations

Crucial role in the preparation and delivery of “Expert Evidence” for and on behalf of NT claimant groups

Need to give cognisance to the fact that the very personal/intimate nature of their research has the capacity to cause and contribute to deep seated internal family conflict, in my experience the vast majority of Anthros have handled these situations with sensitivity and care.

- Lawyers

### Professional and ethical obligations

Preparing NT claims for litigation, the real work is just beginning  
Taking of vital evidence from NT claimant group elders, preparing the best possible case, being strategic  
Is litigation the best possible outcome for the respective NT claimant group  
Taking instructions and looking beyond the determination/agreement

## **The Relationship between NTRBs and Native Title Claimant Groups**

- Recognition by NTRB that it has primarily a support role for NT Claimant groups
- NT Claims to determination stage
- Agreement making Processes, including Certification and Authorisation
- ILUAs
- Post Determination

## **NTRBs and their relationship with ATSIC**

Under the provisions of the NTA, not only do NTRBs have increased statutory responsibilities, but also ATSIC has similarly increased involvement in the monitoring of operations of NTRBs in its dual role, as funding provider, and as adviser to the Minister on a range of matters pursuant to the 1998 amendments to the NTA.

- Commonwealth Govt funding
- Capacity of other parts of the national NT System to obtain additional \$\$\$\$
- Sheer workload of NTRBs
- Operational problems of NTRBs
- Capacity Building and Strategic NT Claim prioritisation
- Need for an effective partnership between NTRBs & ATSIC
- Real fact that there has been no Cth Govt increase in NTRB funding of \$43.6 million, since 1994/95, with any additional funds being provided from within the total ATSIC budget

The ATSIC Capacity Building Project is a part of the “new” NT system funding made available in the recent Commonwealth budget, of the additional \$86m over 4 years, ATSIC obtained \$17.4 million. The majority of this funding is earmarked for an NTRB Capacity Building project. Already a draft NT&LRC Draft discussion paper has been circulated to NTRBs, seeking comment. Without pre-empting just how the project will unfold there are a number of key elements involved in the planning of the project, these include

- Corporate Governance
- Indigenous and Professional Staff Development Programs
- Native Title Technical Training

- Information Technology

The project will not seek to reinvent the Indigenous Adult learning wheel, there many extremely competent Indigenous Learning centres at Unis across the country, who deliver a diverse range of quality Indigenous courses. Because of the complex and evolving nature of Native Title law, increased NTRB statutory obligations and the sheer cultural diversity of NTRBs and their constituency, it is probable a number of capacity building programs will need to be custom developed, incorporating relevant existing modules.

### **Real Outcomes for Native Title Claimant Groups**

- Achievement of a sense of belonging for and to country
- Assist in the self identification process, finding your own family and own cultural identity
- Recognition of traditional owner groups who have care of country responsibilities
- Increased emphasis on Cultural maintenance and revival for traditional owner groups

The reality is that the (2) two things that NT groups seek and desire most of all from the Native Title process, in effect costs nothing, how hard can it be to deliver something that is supposedly free.