

# Land, Rights, Laws: Issues of Native Title

## Native Title Research Unit

Australian Institute of Aboriginal and Torres Strait Islander Studies

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*The High Court Mabo decision in 1992 and the passing of the Commonwealth Native Title Act in 1993 mark a fundamental shift in the recognition of indigenous rights in Australia. The Act, like the High Court decision on which it is based, transforms the ways in which indigenous ownership of land may be formally recognised and incorporated within Australian legal and property regimes. The process of implementation, however, raises a number of crucial issues of concern to native title claimants and to other interested parties. Many of these will have to be decided in the courts. Nevertheless, information about and discussion of the issues are important for those needing to address the matters raised by the claim process.*

*This series of papers is designed to contribute to the information and discussion. The papers address the shift from notions of statutory land rights to the rights of indigenous peoples that pre-existed colonisation and exist within the broad spectrum of their human rights. Within these rights, land is an essential component.*

*The Native Title Act gives a key role in its implementation to representative Aboriginal and Torres Strait Islander bodies. This paper looks at the nature and functions of these bodies, and in particular their resource needs and current funding arrangements. It concludes by raising a number of issues which will need to be addressed in establishing a more equitable funding framework. Professor Jon Altman is Head, and Ms Diane Smith is a Research Fellow, of the Centre for Aboriginal Economic Policy Research (CAEPR), Faculty of Arts, Australian National University.*

*This paper was commissioned by the Native Titles Research Unit, AIATSIS, in December 1994. Subsequently, the authors have been engaged as independent research consultants to assist a wide ranging government review of Representative Bodies.*

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## **FUNDING ABORIGINAL AND TORRES STRAIT ISLANDER REPRESENTATIVE BODIES UNDER THE *NATIVE TITLE ACT 1993***

**Jon Altman and Diane Smith**

### **Introduction**

The statutory designation of Aboriginal and Torres Strait Islander organisations as Representative Bodies in the Commonwealth *Native Title Act 1993* (the Act) is enacted in Part 11, S202 and S203. The statute establishes a broad framework to provide: funding to these Bodies; criteria for their gazettal by the Commonwealth Minister for Aboriginal and Torres Strait Islander Affairs; and definition of three main functional areas of responsibility. The Act under S202(4)(a-c) positively empowers Representative Bodies to assist indigenous people to make and present claims to the National Native Title Tribunal (NNTT); to represent them in negotiations and proceedings in relation to acts affecting native title and the provision of compensation; or in any other matter relevant to the operation of the Act.

The statute is not strict in its definition of Representative Body functions. They are positively empowered to be able to facilitate the claims process, and to represent native title holders and

claimants in negotiations and proceedings 'if requested to do so'. However, it is not mandatory for Bodies to undertake these defined functional responsibilities. There is a degree of vagueness in the statute as to the extent that Representative Bodies can themselves initiate negotiations and proceedings and, conversely, the extent to which they are reliant upon instructions from claimants and potential title holders. This discretion can be partly explained as a reflection of the uncertainty about how the statute will operate in practice. It can also be more positively characterised as a means to provide indigenous Representative Bodies with the potential to strategically target some key native title claims without having a legal responsibility to address all issues.

Representative Bodies are arguably the linchpin of the Act. They are the organisations empowered by statute to represent indigenous claimants and native title holders; and they are the crucial intercultural mediators between indigenous Australians with a native title interest in land, and all others. It is likely that the entire Australian continent will eventually be covered by Representative Bodies and the workability of the Act, both for indigenous and non-indigenous interests, will ultimately depend on these bodies fulfilling their statutory functions efficiently and effectively. Under these circumstances, it is not surprising that issues associated with funding levels, mechanisms and probity already loom large.

This paper focuses squarely on the funding issues surrounding the operation of Representative Bodies. It considers the historical antecedents for funding such bodies; the legislative processes by which Representative Bodies are determined; their resource needs; the current funding arrangements; and concludes by raising a series of issues that will need to be addressed before an equitable framework for funding can be established. As this paper was being prepared, the Aboriginal and Torres Strait Islander Commission (ATSIC) initiated a review with terms of reference that will cover topics discussed here.

### **Historical antecedents**

The issue of funding Aboriginal representative organisations with land rights-related functions has been of significance for at least two decades. In 1974, the second report of the Aboriginal Land Rights Commission (Woodward 1974) recommended that statutory land councils in the Northern Territory should be funded from mining royalties to afford them a degree of financial independence from government. (These bodies have legal functions that have some similarities with those of Representative Bodies, but they are required to represent their constituents (traditional owners) in land claims and in any negotiations about the use of Aboriginal land.) This recommendation was incorporated in the *Aboriginal Land Rights (Northern Territory) Act 1976*. For the period 1978-79 to 1993-94, Aboriginal land councils in the Northern Territory (NT) have received \$152 million (in nominal terms) to meet their administrative costs, much of which has been used to double the Aboriginal land base via the claims process, from 258,000 sq kms in 1977 to 549,000 sq kms in March 1995.

In New South Wales (NSW), under the *State Aboriginal Land Rights Act 1983*, a complex land council system which comprises a peak State-wide NSW Aboriginal Land Council, 13 Regional Land Councils and 118 Local Land Councils is similarly funded from sources independent of normal budgetary appropriations. In NSW, 7.5% of the State land tax is earmarked for Aboriginal people, with a maximum proportion not exceeding 50% being available to finance land council activities. In recent years, a high proportion of income available has been used to meet the administrative costs of land councils. For example, in 1991-92, the NSW Aboriginal Land Council allocated over 80% of available income to land councils. In other situations, such as in South Australia, statutory bodies like Anangu Pitjantjatjara and Maralinga Tjarutja, established under South Australian law, are funded directly from a mix of State and Commonwealth appropriations. However, as these bodies mainly have land management, rather than land claim functions (land grants have been settled over portions of the State, but are not possible in other parts) their fiscal requirements are limited. Similarly, in Western Australia and north Queensland, non-statutory land councils like the Kimberley Land Council and the Cape York Land Council are currently funded from consolidated revenue via ATSIC.

This brief comparative history is presented here for a number of reasons. First, the issue of source of funding for land councils has been an important one, with the major NT Land Councils maintaining a clear preference to remain independent of the normal budgetary bidding process. This independence has been at least partially responsible for their effectiveness as an indigenous political force. Second, the sheer scale of expenditure needed to establish effective organisations is instructive. Third, some land councils established by statute are now also Representative Bodies. Such bodies obviously enjoy a degree of advantage owing to their pre-existing critical mass of expertise, and their past experience claiming land and negotiating for development with non-indigenous commercial interests. Finally, the variation in the structure, functions and funding of 'representative bodies' established by land rights, rather than by native title legislation, provides a complex backdrop of established and at times extremely powerful organisational interests with which ATSIC must negotiate in its attempt to develop good funding policy and practice.

### **The current status of Representative Bodies**

The range of functions and appropriate funding levels required by Representative Bodies is only becoming apparent as their roles are progressively clarified in actual claim and negotiation processes. The nature of many legal issues with which Representative Bodies will be concerned is yet to be resolved.

Under S202 of the Act, organisations apply for representative status to the Commonwealth Minister. The Native Title Section within the Land, Heritage and Culture Branch of ATSIC then assesses the 'representative' and administrative capacity of applicant organisations, on the basis of information provided by regional and State and Territory offices. This assessment is forwarded to the Commonwealth Minister's office for consideration, and approval or rejection. Recommendation by ATSIC does not automatically ensure ministerial approval, for the latter is required to be legally 'satisfied' under S202(3)(a-c) that the proposed body is 'broadly representative', 'satisfactorily' performs its existing duties, and will continue to do so. Importantly, from the funding point of view, S202(2) allows the Commonwealth Minister to determine more than one of these Bodies for the same geographic area.

At April 1995, there are 17 indigenous Representative Bodies as determined under conditions specified in S202 of the Act. Several others are also before the Minister for determination. On the basis of office locations, there are five in the Northern Territory, five in Queensland, three in Western Australia, two in South Australia and one each in Victoria and New South Wales. Neither Tasmania nor Torres Strait Islander communities currently have a gazetted Representative Body, though organisations in both areas have received funding for preliminary native title activities. Two of the organisations based in the NT have clients with interstate land interests in SA and WA. Four of the Representative Bodies in the NT, one operating in SA and one in NSW are statutory land councils established under Commonwealth and State land rights legislation respectively, and thus have existing land-rights related functions defined by law. Three Bodies are established Aboriginal Legal Services which effectively have operational interests over the entire States in which they are based (Victoria, WA and SA). While some Representative Bodies are long-standing organisations, others have been recently established specifically to deal with native title issues. Given the great variety of organisational structures and operational histories among current Bodies, there are no uniform structural or electoral mechanisms for ensuring 'representativeness'. For example, some have all Aboriginal Boards; some elect these members, others are self-elected; some have ATSIC regional councillors and even Commissioners as members, others do not.

At present, there are no readily available data that might allow a more detailed comparison of the similarities and differences between existing Representative Bodies. For example, there is no collated information on the relative indigenous populations serviced by each Representative Body, no readily available maps that clearly depict jurisdictions (with the exception of statutory land councils), and little information on the potential demands for these

organisations based on key indicators like availability of unalienated Crown land for potential native title claim, or the rate of non-claimant and 'future act' applications to the Tribunal. (However, evidence presented to the Parliamentary Joint Committee on Native Title (PJC) by Representative Bodies already refers to 'an avalanche of inquiries' (Commonwealth of Australia, Official Hansard Report 1994a: 580).)

A separate category of so-called 'non-representative bodies' also operates concurrently with gazetted Representative Bodies. This label is not to suggest that these other organisations are not 'representative' (they may or may not be), but rather that they do not have statutory recognition under S202 of the Act. Non-representative bodies are incorporated associations representing a particular indigenous interest group and may operate in the same area as a gazetted Representative Body and in respect to a claim over an identical area of land. The role of such bodies in acting for native title claimants has partially developed out of local political tensions and a number have received initial funds from ATSIC. This situation is currently under scrutiny; in March 1995, the ATSIC Board of Commissioners decided to place a moratorium on the funding of such bodies pending the outcome of the forthcoming review. However, alternative sources of funding are still available to them (see below).

### **Resource needs of Representative Bodies**

Representative Bodies need resources for four broadly simplified functions: to make native title claims; to respond and negotiate with respect to non-claimant applications and 'future act' notifications; to assist in proceedings for compensation; and to mount test cases. The preparation of native title claimant applications is complex and time-consuming. In many cases, complicated historical land tenure searches must be accurately conducted by claimants or Representative Bodies (in some cases with assistance from the NNTT); detailed research and legal advice is required to prepare applications for submission; and upon acceptance by the NNTT, Representative Bodies and other claimant advisers may be involved in lengthy mediation before the Tribunal. All these processes incur substantial costs. Similar costs, including further research required to identify potential native title interests, are involved in responding to non-claimant applications to the NNTT and 'future act' notifications. The latter responses though, will occur under much greater pressure owing to a two-month time-limit that Bodies and claimants have available to lodge and have registered a native title claim

As at March 1995, 61 claimant applications have been presented to the NNTT, comprising: 36 not yet accepted, five referred to the President, 11 accepted, one withdrawn, four rejected, three referred to the Federal Court, and one at 'partial/full agreement' stage. None have been finally determined. Of these, 20 are located in Western Australia, 15 in Queensland, 13 in New South Wales, eight in the Northern Territory, three in South Australia, one in Victoria, and one in Tasmania. Of some 54 claim applications before the NNTT at March 1995, 31 were assisted by Representative Bodies, and 23 by non-representative bodies or law firms acting directly to claimant groups. These data raise important questions about the need to nationally and strategically fund Representative Bodies according to native title work load.

Up to March 1995, there have also been 54 non-claimant applications, composed of: 13 accepted, 24 with interim findings and/or adjourned, two not yet accepted, four dismissed, five have been withdrawn and six non-claimant applications have been determined. While the greater number of claimant applications, as at March, were from WA and Queensland, by far the greatest number of non-claimant applications were in NSW. However, subsequent to the High Court ruling in March 1995 on the WA challenge to the Commonwealth Act, non-claimant applications will increase, substantially so in States such as WA where the greatest percentage of claimable unalienated Crown land is located. (At March 1995 there were only two non-claimant applications from WA before the Tribunal; it is anticipated that exploration licence non-claimant applications and 'future act' notifications could number several thousand per annum in this State given the extent of unalienated Crown land.) Clearly, the potential workload of Bodies in these areas needs to be factored into funding levels.

Some indigenous claims, for example the Wik claim in Cape York Peninsula, are test cases and Aboriginal bodies (both representative and 'non-representative') are currently sponsoring such cases in order to gain legal clarification of key aspects of the Act. Owing to different State and Territory statutes (current and historical) similar test cases may need to be run in a number of States. The Attorney-General's Department (AG's) has a Test Case Committee with representatives from that department, from the National Farmers' Federation, the Australian Mining Industry Council and ATSIC, to advise on precedent-setting cases which may require funding. Representative Bodies do not appear to have membership on this committee. At this stage, there appears to be little national or State strategic coordination by ATSIC, AG's or Representative Bodies in conducting such cases, with the result that different indigenous organisations and groups are separately pursuing similar test cases. There is an urgent need for Representative Bodies collectively, and possibly in conjunction with ATSIC and AG's, to prioritise test cases. While ATSIC and AG's are the major funding bodies for such cases, they cannot assume responsibility for strategic planning, which lies more appropriately with Representative Bodies.

The 'significant resource needs' facing Aboriginal people in participating in this plethora of native title processes has been noted as an important issue by the Parliamentary Joint Committee on Native Title's First Report (Commonwealth of Australia 1994a: 12-14). The question of exactly what resources and funding arrangements exist to meet these needs appears to have been the cause of confusion amongst both claimants and some Representative Bodies.

### **Funding Representative Bodies**

Provision for financial and other assistance to Representative Bodies and to indigenous claimants and parties is laid out respectively in S203, and S183 and S78 of the Act. While the practical implementation of funding arrangements to satisfy these statutory obligations is still at a very formative stage, ATSIC is clearly the major funding agent. These funding sources are considered below.

#### *ATSIC and the Commonwealth Minister*

S203 provides for financial assistance to Representative Bodies to perform their functions under S202, upon their application to the Commonwealth Minister or to ATSIC (S203(1)). Both the Minister and ATSIC are required to be satisfied that it is 'reasonable' to fund such requests (S203(2, 3)). While the Minister has been empowered under the Act to authorise Commonwealth legal or financial assistance to Representative Bodies, to date it is ATSIC that has had carriage of providing funds to them.

ATSIC guidelines currently refer to two major program areas for native title funding. These have been in operation since the passage of the Commonwealth legislation, but have been progressively reformulated (Commonwealth of Australia 1994b: 91). On one hand, there are funds allocated under the Operational Support (Representative Bodies) Program. These funds cover the recurrent and capital costs of organisations including recurrent wages of employed staff and purchase of vehicles and office equipment. Establishment operational funds to date have varied from \$100,000 to over \$1 million per body. Second, there are funds allocated under the Native Title Claims Program for the researching and preparation of claims, and representational work in relation to the NNTT. Under both these program areas, financial assistance may be sought for contracting out services need by the Representative Body, for claim preparation, land-tenure history searches, mediation and arbitration.

For the part-year 1993-94, \$3 million was provided under the Native Titles Claims Program and \$3.5 million under the Operational Support (Representative Bodies) Program. In 1994-95, an estimated \$4.9 million was allocated under the former program and \$8.4 million under the

latter. Indicative allocations for 1995-96 are \$6.3 million as proposed distribution to Representative Bodies for operational support and \$6.7 million for native title claims.

Broad criteria are used to assess funding bids. These include, the urgency of claims due to aged claimants, claimants whose interest are affected by third party claims, claims which are uncontested or have a high chance of success, or for which time constraints apply. In their request for funds, Representative Bodies must provide information on current and likely claims being researched, applications to be lodged, requests for litigation and indicative costs for each application or project for which funding is sought. Budgetary bids for these funds are dealt with by ATSIC within its annual funding cycle.

Additional resources have been made available at regular intervals during the financial year. This is because the Commission is finding that it is subject to further requests for funds, as many Bodies only become aware of funding needs when approached by claimants or when seeking to respond quickly to a non-claimant application. As a result, there is currently a high degree of flexibility in funding arrangements; funds are requested and allocated on-the-run. Some newer bodies are still developing the skills required to estimate and submit annual budgets; and many of the native title matters in which they may become involved are difficult to predict. Such flexibility was important in the early period of the land rights legislation in the NT, and has been equally so under the new native title regime. It is likely that, with time, and experience, funding cycles will become more regular and systematic.

In this early phase of the Act's operation ATSIC has extended its funding role to cover assistance to any incorporated organisation (loosely termed 'non-representative bodies') that has not been determined to be a Representative Body under the Act. A ceiling limit of \$50,000 per organisation per annum was set by ATSIC on assistance. This funding was seen as adequate for initial legal opinions, research and travel for the preparation of a claimant case. This funding is not recurrent which means that without strict budgeting, claimants may be left without financial resources after initial allocation. Increasingly, this expansion of ATSIC's funding coverage introduced a growing number of Aboriginal organisations into the native title claims arena, concurrent with the activities of Representative Bodies and competitively bidding for funds. The provision of such funding, which is currently subject to an ATSIC moratorium, exceeded statutory obligations. Section 203(1) and (3) directs ATSIC to fund Representative Bodies, not individuals or claimant groups acting independently. The funding of 'non-representative bodies' partly occurred because many groups were awaiting determination as Representative Bodies; it also partly occurred because it is not mandatory for Representative Bodies to represent all claimants and because some claimants have chosen to bypass Representative Bodies.

#### *The Attorney-General's Department*

The second major source of funding for native title matters is from the Office of Legal Aid and Family Services within AG's. S183 of the Act stipulates that the Attorney-General may grant financial assistance to parties involved in an inquiry before the NNTT or proceedings before the Federal Court. This allows Aboriginal claimants and organisations to request funds, on the condition that they are 'not eligible' to receive funds from any other source, including ATSIC. This is an ambiguous criterion and the cause of some difficulty within AG's in assessing the legitimacy of Aboriginal funding applications. Does it mean that such parties are judged to have had adequate funding already, that the case lacks substantial merit, that applicants are not legitimate claimants, or that they are legitimate additional parties to a claim submitted by another Aboriginal group? Under which of these circumstances should Aboriginal parties be eligible for funding from AG's?

AG's also considers issues of hardship and reasonableness in its decision to grant funds. The Department currently has some \$6 million per annum to cover all requests for funds (Aboriginal and non-Aboriginal). AG's applies strict Federal Court Scale fees to its assessment of requested legal costs. There is considerable scope for improving the level of coordination between ATSIC and AG's over the management and allocation of funds.

#### *The National Native Title Tribunal*

Finally, the NNTT itself, under S78, may give assistance to people to prepare applications, including research services and land-tenure search assistance. The Tribunal has indicated that it is conscious of the need of applicants for more assistance in the preparation of claims (submission to the Parliament Joint Committee, Commonwealth of Australia 1995: 6-7) and is currently seeking a significant increase in its budget from \$6 million per annum to \$12 million. However, the Tribunal's recent draft guidelines regarding the forms that such assistance might take, specify that it 'does not provide legal advice (or) provide funding for applicants'.

#### **Some emerging funding issues**

There are clearly a wide range of issues emerging that need to be addressed before an equitable framework can be established to fund Representative Bodies. Our aim here is not to be exhaustive. Rather, we focus on five issues that are, in our opinion, of paramount significance, including: what constitutes effective representativeness; the need for framework guidelines; ensuring funding coordination and accountability; an appropriate funding role for ATSIC; and estimating the costs of the claims process.

#### *Effective representativeness*

It is unclear in the current situation, exactly what 'representative' in S202 actually refers to and how it is assessed for legal determination. It is also unclear under what circumstances a Representative Body might be 'undetermined'. Certainly, almost all Bodies, as currently constituted, are not representative in the western democratic sense of ATSIC-elected representatives. But presumably the Bodies must be able to demonstrate that they represent and serve a potential claimant constituency; and in the interests of realising economies of scale, a reasonably large constituency.

More importantly perhaps, once officially recognised as such, Representative Bodies should be required to represent in that other meaning of the term 'representative'; that is, they should proceed to serve and represent the interest and wishes of claimants and native title holders. Indeed it can be readily argued that greater procedural clarity in functional responsibilities will assist potential claimants and native title holders ensure accountability from their Representative Bodies. Unfortunately, it appears that many claimants have been led by politicians to believe that there could be as many Representative Bodies as there are claimant groups (Commonwealth of Australia, Official Hansard Report, 1994b: 152). But an immediate question must be, to what societal level can organisational representation be funded? An effective constraint will be that funds are simply not available for this level of representation. In any case, the Representative Bodies will need a critical staff mass and significant scale of operational coverage to be effective.

The PJC has noted that 'equitable access' to the native title processes is critical if the aims of the legislation are to be realised (Commonwealth of Australia 1994a: 13). Clearly, Representative Bodies will be key agents in either hindering or facilitating such 'equitable access'. It is already apparent that the diverse organisational structures of current Representative Bodies means that only some already have well-defined mechanisms for determining and representing the interests of potential Aboriginal clients. For example, in the NT statutory land councils have representative Aboriginal Boards which act as policy-making

and planning bodies. They are also experienced in research and the conduct of development negotiations. Aboriginal Legal Services also have Board and Executive management structures and should be able to efficiently coordinate legal advice. But they have demonstrated an historical reluctance to represent disputing Aboriginal parties, and may have little research expertise in respect of indigenous land tenure systems. More recently established Bodies may have little experience in any of these matters. As a result of this differential experience and expertise, there is little doubt that at the moment some claimants are being more effectively represented than others.

How best to represent claimant interests will be highlighted when there are claimants in dispute, or when there are a number of pressing claims. In these circumstances, experience in the NT indicates that Representative Bodies will need to be able to assume a coordinating role that facilitates equitable treatment of claimants and, specifically, that ensures their continuing access to representation even if the services required are contracted to another organisation or to external experts. This will require Representative Bodies to have provisions to brief out conflicting claims, and funding for such a capacity. An important element of the work of such bodies then, will be the need for them, in turn, to assess the 'representativeness' of potentially competing claimant groups seeking assistance. With some groups/persons making claims in competition with other interested Aboriginal groups/persons, Representative Bodies will have to assess the status of indigenous land ownership, determine the merits of asserted claims and make funding decisions accordingly. Just as the NNTT is required to decide whether particular applications before it are vexatious or frivolous, so too may Representative Bodies.

But in all these important matters, it is not clear how Representative Bodies, once determined, can subsequently assert a representative 'right' or responsibility when there are other gazetted and 'non-representative bodies' potentially operating within the same area; when the jurisdiction of some Bodies covers a whole State and thereby cuts across region-specific Bodies; and when a Body can operate outside of its designated area and within that of another Body in order to mount competing claims.

A number of Representative Bodies assert that establishing cost efficiencies and planning strategically for the conduct of claims is impossible when there may be other organisations covering the same geographic area and competing for claims and funding, and when untenable claims are encouraged by the sheer fact of disenfranchised groups being able to obtain funds from an increasing number of Bodies, or from second bites of the funding cake available from different government agencies. As Noel Pearson has noted to the PJC (Commonwealth of Australia, Official Hansard Tw 498ert thar5TD 3me ore funding cake

certain operational procedures and systems of accountability (to both claimants and to funding bodies) will need to be consistent for all Bodies, and should be considered therefore, at a national level.

A number of these issues have been long-considered in the NT where the major Central and Northern Land Councils have had twenty years in which to address many issues that might be covered within such guidelines, including: the coordination of research, preferred consultation procedures with claimants, the practice of seeking instructions from claimants, the use of standardised contracts established fee rates for engaging researchers and legal advisers, and the practice of briefing out services to provide equitable access to disputing claimant groups. Newer Representative Bodies with limited experience in these matters could usefully seek guidance from more established organisations. To this end, it would be useful to hold State or national meetings of Representative Bodies to enable expertise to be shared, and common guidelines and strategies to be discussed and possibly adopted.

Representative Bodies are also being called upon to educate indigenous communities about the practical implications of native title. Such an educative role was recognised by the Central and Northern Land Councils in the early days of NT land rights legislation, as being an integral part of their representative responsibilities. The short-term funding implications of such additional functions, that will result in net savings in the longer term, need to be considered by ATSIC.

#### *Ensuring funding coordination and accountability*

National guidelines for funding and resource allocation are now being developed by ATSIC, AG's and the NNTT. But to date, there seems to have been considerable confusion amongst potential claimants as to which agency is funding what area of the native title claims process. This confusion is exacerbated by the fact that at the national level, there are currently no procedures in place for ensuring inter-agency coordination in the provision of resources to Aboriginal claimants and organisations. This has undoubtedly resulted in some wastage of resources. Clearly, there needs to be greater transparency, clarity and consistency in the existing funding arrangements established by all three.

It is debatable whether AG's has a legitimate role in funding indigenous claimant groups or parties, as distinct from non-indigenous groups. Its inexperienced activities in this area, although a legitimate and responsible outcome of funding obligations established in native title law, could simply result in duplication of funds to claimant groups, and unwittingly exacerbate local conflict and confusion. Under S183(5) of the Act, the Attorney-General may delegate to a holder of an office in the Senior Executive Service of the Australian Public Service all, or any, of its funding powers under S183. In other words, in the interest of rationalising program administration, AG's may be able to delegate its responsibility (and funding) for financially assisting Aboriginal parties to a native title matter to an ATSIC officer. If this is not feasible under the conditions of the Act, then at the very least, formalised mechanisms for funding coordination between ATSIC and AG's should be established.

At the local level, uniform mechanisms are also needed to ensure the financial accountability of Representative Bodies and claimants for funds received. There is a strong case for a regulatory requirement for Representative Bodies to publish annual reports. Presumably, as incorporated bodies, audited financial statements will need to be lodged with registrars and with ATSIC. However, given the broad ranging functions of some Representative Bodies (especially those that are also statutory land councils) it might be appropriate for separate annual reports to be prepared to demonstrate that resources provided for specific native title purposes are tied to such functions, and to rigorously demonstrate outcomes. Such a level of accountability is currently required of statutory land councils and ATSIC regional councils.

### *An appropriate funding role for ATSIC*

It makes sense, on the one hand, for all funding of Representative Bodies to be coordinated through ATSIC. This should lead to more sensible and efficient coordination of funds across States and organisations. However, the concentration of resources in one organisation is potentially problematic, especially if ATSIC continues to pursue a policy of decentralisation to the regional council level. Accordingly, native title funding may progressively fall under growing pressure to be allocated at the regional council level. Introducing another tier of localised allocative decision-making may simply increase local politicking and potential for associated waste, and undermine the potential to allocate funds either strategically or on the basis of need. There are sound policy grounds for ensuring that funds for Representative Bodies remain quarantined as a discrete national program area within ATSIC.

It is timely for ATSIC to consider whether funding levels for Representative Bodies should take into account a number of criteria, including: the degree (or lack) of existing organisational infrastructure available, the size of the geographical area to be served, the number of indigenous people resident within that area, the amount of potential claimable land in the area, the number of current test cases, the number of cases within the court system, and the extent of non-claimant activity requiring response.

ATSIC's current practice of funding some organisations in a 'stage of matter' manner (for example, claim-by-claim or for certain parts of a claim process only) could encourage ad hoc decision-making and is a cause for concern amongst claimants who are not assured that they can proceed from one stage to another. All Representative Bodies need to be considered for ongoing annual budgets on the basis of detailed estimates of future needs; bearing in mind that funding flexibility will be needed to cope with the uncertain timing and duration of many native title activities. Some Bodies have suggested that provision be made for claims funding to be tied to the entirety of a claim process, with block funding provided on a triennial basis.

### *Estimating the costs of the claims process*

The majority of Representative Bodies assert that the current level of resources available are inadequate. In the recent ATSIC budget, total bids of some \$38 million were submitted by Bodies for various native title claims and litigations, and approximately \$14 million was made available. Some Bodies assert, probably quite rightly, that the federal government appears to have little idea of the costs involved in the legislative processes it has established for claiming native title, especially those presided over by the Tribunal. It is also important to keep in mind that costs are related to a wide range of activities apart from the claims procedure, and that larger, more contentious claims may take several years to be finally determined. In spite of the considerable land claim research activities and budgeting experience of Central and Northern Land Councils in the NT, their hard-won knowledge does not seem to have been widely disseminated, either to other emerging Representative Bodies or to funding agencies.

There is concern amongst both Representative Bodies and government at the burgeoning legal costs in some claims, as well as the costs of land tenure searches, of producing cadastral maps, carrying out research and participating in mediation; all with negligible tangible outcomes to date. These costs are likely to increase in parallel with the projected increase in non-claimant applications and 'future act' determinations before the NNTT, and as some cases proceed to court. While there is growing expertise and professionalism amongst researchers and lawyers working in the field of land rights, there remains a dearth of experienced professionals to provide assistance to claimants. The increasing number of 'native title units' now being established within legal firms across the country also means that claimants inexperienced in supervising the work of legal advisers may end up paying for costly, but inadequate, advice.

Specifically, there is a need for ATSIC to conduct an assessment of what constitute the reasonable, ongoing funding needs of Representative Bodies. More generally, there is clearly potential for an advisory and regulatory role to be played by both ATSIC and experienced Representative Bodies to ensure that public moneys are not wasted and that outcomes are achieved.

### **Conclusion**

ATSIC and Representative Bodies are faced with a tactical balancing act. On one hand, expensive and time-consuming legal, research and consultative processes loom very large in the processes established by the Act. On the other, political reality dictates that outcomes, in terms both of the recognition of native title (from the indigenous perspective) and of commercial development of land where native title has been recognised (from the wider societal perspective) are urgently needed. An essential element in achieving future outcomes will be the establishment of well-resourced and efficient Representative Bodies, for these are the organisation which will underscore the workability of the Act.

However, government has not provided ATSIC with unlimited resources to fund Representative Bodies: a fiscal ceiling has been placed on new resource allocations to operationalise the Act. At this early juncture, however, it is unclear if the global allocation, which is currently in the region of a not insignificant \$25 million per annum is, or will be, adequate. Under such circumstances, it is essential that ATSIC and Representative Bodies collaborate. Creative solutions to complex issues are needed.

At the micro-distributional (funding) level, ATSIC and Representative Bodies must work together to achieve common goals. One option is for Representative Bodies and ATSIC to formulate regulations for Representative Bodies. Section 215(1) of the Act provides for regulations to be made by the Governor-General, prescribing matters 'necessary or convenient ... for carrying out or giving effect to' the Act. This provision could be used to establish statutory regulations outlining uniform guidelines for the treatment of native title claims; to require annual reports by Representative Bodies; specifying mechanisms for the coordination of funding at the inter-agency level; to democratise all Representative Bodies and to require them to represent (either directly or by delegation) all constituents to avoid continual fragmentation.

On the wider strategic front, it is important to recognise that there are no sunset clauses in the Act for lodging native title claims. Consequently, given limits on financial resources, it is critical that strategic decisions are made about prioritising claims, test-cases and responses to non-claimant applications. Tactically, it might be necessary for Representative Bodies to prioritise some claims over others, or to overlook some non-claimant applications. Tangible solace to those indigenous Australians who miss out in the short-term could be made available if the activities and outcomes of Representative Bodies are directly linked in future to timely land acquisitions by the newly-established Indigenous Land Corporation.

Strategically, it is essential that ATSIC and Representative Bodies do not become adversaries over the division of the funding cake, but rather that they proactively use both provisions of the Act and available financial resources to ensure maximum benefit from native title for as many indigenous Australians as possible. For the same reasons, it is also essential that the ability of Representative Bodies to undertake their legislative functions is not eroded by organisational rivalry and competition for funds, and that they are able to assert an orderly and strategic approach to their native title activities.

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