

## **WHO BEARS THE COSTS OF NATIVE TITLE REPRESENTATIVE BODIES (NTRBs) CAPACITY BUILDING?**

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### **Introduction**

Native title services are delivered in cross-cultural settings. This fact immediately points to the complexity of their service delivery. Native Title Representative Bodies (NTRBs) are interface organisations at the cultural nexus between two different systems, cultures and political constituencies. They have diverse constituents to negotiate with the Indigenous polity, as well as corporate and government agencies.

NTRBs are also expected to operate competently while managing in such organisational and political complexity. However, little acknowledgment of these complex tasks is made during either Government allocation of resources or in the manner in which other, better endowed key players in the native title system operate in partnership with NTRBs.

Little understanding of the impact of the intercultural forces NTRBs are expected to manage is made by external agencies such as the Federal Court in its view that NTRBs must comply with its timetables and case management. NTRBs tend to be the 'poor relation' in the native title system. They have minimal control over much of their working circumstances and tend to be more reactive, than they might like.

Since amendments to the *Native Title Act 1998*, NTRBs have had statutory functions grafted onto what were essentially community-based organisations. Unfortunately, many NTRBs had little previous experience of bureaucratic culture or professional workplace practices as community organisations. Consequently, the learning curve has been steep and rapid.

The marriage between the divergent organisational structures and objectives involved has resulted in the uneasy partnerships now evident Australia-wide. Indeed, the mismatch within the NTRB system is very evident in relation to the question of NTRB representation. Do NTRBs actually represent potential native titleholders through membership and board positions as community organisations once did; or do they represent their constituents through equal access to service provision and communication across the Indigenous community? The answers are unclear to many in the Indigenous community.

Reviews since the introduction of the NTA of the capacity within NTRBs to manage the new legislative demands indicate that the cultural shift from

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community-based organisations to professional service agents is a daily challenge and yet to be fully embraced.

It remains to be seen whether the fit between these different organisational objectives can be made more comfortable. But two points are clear:

1. ATSIC funds for capacity building will seek to provide support for organisational transition and transformation within NTRBs. It is inevitable that when building new institutions in cross-cultural contexts, difficulties will arise that require time and significant energy to resolve.
2. The paper argues that responsibility for progressing native title claims must be shared more equally across the key institutions forming the current native title system. NTRBs are simply one set of organisations in this system.

Funding across the native title system is provided to all key institutional players such as the NTRBs, the National Native Title Tribunal (NNTT), the Federal Court and State and Commonwealth governments, as well as non-claimant respondents. However, while accountability has been made a high priority by government for assessing the effectiveness of NTRBs we also know that such standards are unequally spread across the institutions involved with claim determination.

We also know that the key institutions are seeking increased individual funding based on their assessment of workloads predictions and workload costing. But as the Love/Rashid report pointed out in 1999, the current funding for NTRBs was inadequate even prior to the commencement of mandatory functions following amendments to the NTA. So the evidence from a number of NTRB reviews Australia-wide suggests that under-funding has been endemic and ongoing. Additionally, performance of new, mandatory functions in NTRBs has not received specific funding, while other corporate players, arguing increasing workload and costs have received extra funds.

Contrastingly, NTRBs resource issues are frequently ignored or dismissed by the agencies as they interact with one another to progress claims and future acts. In particular the Federal Court refuses to accommodate the impact of their decision-making over time lines for litigation etc. on NTRBs. Indeed, this refusal has constrained the capacity of NTRBs to adequately represent their clients' interests. Because of resource constraints and organisational issues many NTRBs have only a limited capacity to progress issues at the same efficiency rates as do other key stakeholders.

ATSIC is aware of these problems and has developed a capacity building program to address them. However, ATSIC does not have all the answers to the wider problem of developing new institutions capable of effectively working across the complex cultural divide. But some issues are clear. For example:

## *Who Bears the Cost of NTRB Capacity Building?*

1. The need for all institutional players in the native title system to contribute to the costs of ensuring the process is effective, efficient and accountable.
2. Publicly available data confirms NTRB views that the burden of carrying the system does not fall equally. As early as 1995 the ATSIC Review of NTRBs recognised that appropriate financial and human resourcing was critical to effective service delivery. The subsequent Love/Rashid Report (1999) further highlighted the need to maintain appropriate funding levels across NTRBs and in relation to variations in workloads and other key factors.
3. However, while the NTRBs' needs for better resourcing has been clearly articulated, ATSIC has not been able to gain additional global funding on a consistent basis. Other institutional players have gained; it seems, at the expense of the loss in funding to the NTRB system.
4. In the case of players such as the Federal Court, the NNTT, government agencies, and non-respondent parties, they have not only gained additional dollars, but by comparison are increasingly outstripping the NTRBs capacity to keep pace. Moreover, the difficulties for NTRBs when juggling the demands of financial management for simultaneously time tabled litigated claims is not appreciated. For example, the KLC was unsuccessful in convincing the Federal Court to adjourn hearings for a number of litigated claims. In the face of severe budgetary shortfalls the KLC's only options for meeting the required funding to service these cases was by retrenching staff, cutting staff salaries and selling organisational assets. Such solutions are hardly desirable and will not contribute to a sustainable system for claim resolution.
5. The funding contrasts between key stakeholders is evident from figures on comparative grants to native title corporate players: in 2001-02 Federal Government budget gave \$36m to the NNTT; \$16.9m to the Federal Court; A-G's \$ 15.8m; ATSIC \$17.4m (\$6m for litigation test cases over 4 years; and \$11.4m over 4 years for capacity building).
6. Resource differences are not the only issues of inequity. Accountability requirements across the native title system are currently unevenly applied to key institutions. Take for example, the matter of accountability for public funds. The Federal Attorney-General's Guidelines for Financial Assistance in Native Title Matters to non-claimants, distributes funding with far less accountability measures than that expected of NTRBs. The inequities stem from application of differential funding principles (for instance, assistance to non-claimants is on a case-by-case assessment whereas NTRBs are given annual funding to be selectively allocated across identified needs; while the reporting on publicly funded expenditure spent by non-claimants is less onerous than that required of NTRBs).

## Conclusions

NTRBs operate at the interface of two cultures in a highly complex arena. Their capacity to attract highly skilled staff is limited by the difficult working conditions, the lack of professional career paths, less than market remuneration for specialist expertise (especially when compared with legal practice in the private sector), remote area employment and lifestyles. In addition, many NTRBs are continuing to grapple with fraught workplace cultures as the need for transition from community organisation to service delivery occurs.

To get native title outcomes we need broad support *across* the system and from *all* institutions involved, including greater emphasis on strategic partnerships for realisation of common objectives. Such partnerships should be formed where identified blockages in process occur. For example, an agreement about common policy positions between State and Federal Governments would facilitate assessment of connection report for claims.

The principles on which financial and resource allocations are made to key organisations needs to reflect the functions and associated workloads involved. These workloads also need to be realistically costed. ATSIC is establishing a database to enable them to better argue their position in the inter-institutional funding forums.

An NTRBs CEO leadership forum has been established by ATSIC to support NTRB organisational and managerial change. This is an initiative to offset critical structural disadvantages evident in many NTRBs during the transition from community-based organisations to professional service agents. The leadership program will focus on improved governance and change management amongst other identified outcomes for the initiative.

ATSIC intends to use the capacity building funds available over 4 years to develop organisational parity between NTRBs and their partners across the native title system. A common IT system linking all NTRBs, including the provision of a web site to operate as a cutting edge communication resource for NTRBs, is currently under way as one means for redressing the gap.