

# THE SHAPE OF THE FUTURE? THE FINAL REPORT OF THE DELOITTE REVIEW OF THE ROLES AND FUNCTIONS OF NATIVE TITLE ORGANISATIONS

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On 21 May 2014, the Department of Prime Minister and Cabinet released the final report of the Review of Roles and Functions of the Native Title Organisations that was initiated in 2012.

The final report, which runs to 140 pages, provides a comprehensive account of the native title system as it currently operates. Locating Registered Native Title Bodies Corporate (RNTBCs) at the core of the native title system, the report highlights the need to strengthen the capacity and governance of native title organisations to support greater social and economic development for Aboriginal and Torres Strait peoples around the country.

The authors of the report recognise that native title is a significant mechanism by which governments can support 'closing the gap' on Indigenous disadvantage, and emphasise throughout that a poorly functioning native title system will detract from achievement of broader policy objectives in the areas of education, employment and community safety.

Running alongside these social justice and equity concerns, the report also finds that the current lack of funding to RNTBCs in the post-determination phase impedes not only the ambitions of native title holders but also those of governments and industry seeking to conduct infrastructure and resource development projects on native title lands.

The fact that the aspirations of native title holders and the ambitions of government and industry are at times incompatible is a silent and unresolved tension that runs throughout.

A key 'take home' message of the report is that both RNTBCs and the native title representative bodies (NTRBs) and service providers (NTSPs) that support

them are essential to the effective operation of the system and will need at least basic government funding for the foreseeable future.

RNTBCs in particular need more support beyond what they currently receive, and greater choice in how it is delivered. Such funding should, the report suggests, be temporary and transitional and directed towards strategic planning to achieve long-term independence.

## Background to the Review

The primary objective of the Review was to assess the roles and functions of NTRBs/SPs to ensure that they continue to meet the evolving needs of interest groups throughout the system, but in particular the needs of native title holders and their RNTBCs after claims have been resolved.

The specific terms of reference for the Review included consideration of:

- the role of NTRBs and NTSPs in promoting and facilitating sustainable use of benefits flowing from agreements and settlements
- the scope for rationalisation of the numbers of NTRBs and NTSPs currently operating
- whether there should be legislative changes to NTRB and NTSP existing powers and functions specifically to include assistance to RNTBCs
- 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

The terms of reference for the review stated that any recommendations should assume that there will be no new funding available for the sector in the foreseeable future.

The review's findings as set out in the final report are drawn from a broad evidence base. The reviewers held consultations

with 50 RNTBCs, 15 NTRBs/NTSPs, all state and territory governments, and a number of industry representatives. They received 58 public submissions from organisations and individuals including many NTRBs, NTSPs, RNTBCs, individual native title claimants and holders, state governments, industry representatives and private law firms.

The reviewers also sought input from a reference group comprising representatives of the Commonwealth Attorney General's Department, the Department of Families, Housing, Community Services and Indigenous Affairs, a number of NTRBs, the Minerals Council of Australia, the Queensland Government, the National Native Title Council, the University of Melbourne, the Law Council of Australia and AIATSIS. (Although there are now over 110 RNTBCs around the country, only one was invited to sit on the reference group).

## Findings: The role of NTRBs and NTSPs

In relation to the work of NTRBs and NTSPs, the review found that these organisations will continue to play a central role in the native title system in both pre- and post-determination contexts, and should be supported to do so.

The Report recommends ongoing provision of a base level of funding for NTRBs/NTSPs to maintain their core capabilities in legal services for future acts and agreement negotiation.

It does not, however, support legislative amendment to NTRBs/SPs existing functions and powers to specifically include support to RNTBCs.

It also clearly flags the evolution of the services that NTRBs/NTSPs provide to RNTBCs as requiring a shift from a program delivery model to a fee

for service model that operates in an overarching context of a contestable market.

The implied future for NTRBs is as independent not-for-profit service providers, rather than grant-reliant non-government organisations.

### **Findings: the role of RNTBCs**

The Report articulates in some detail the capacity issues facing RNTBCs. Of most concern is a chronic lack of capacity in the essential areas of administration, planning, engagement with members and provision of expertise.

These capacity issues seriously constrain the abilities of RNTBCs 'to give effect to the Act', interfering with the management of native title lands and associated rights and interests, and compromising the potential of infrastructure and resource development projects. 'Without adequately functioning RNTBCs', the report suggests, 'the native title system will be fragile and the ambitions of stakeholders...will be impeded'.

The solution proposed by the review is well-targeted additional funding for RNTBCs in the form of initial short-term government support provided early in the post-determination phase to get RNTBCs on a 'pathway' to independence, and ongoing base level government funding to help RNTBCs meet compliance and governance obligations.

Such funding should involve case-by-case tailoring of funding to meet the specific needs of individual organisations, and should be subject to means testing and accountability measures. The Report also opens the doors to providing greater choices to RNTBCs about how they contract the services they need.

The authors suggest that the overall amount required to support development of RNTBC capacity will be 'modest' in the context of the broader system. Nevertheless, the question remains: if there are no new monies available, where will this funding come from?

The Report suggests a 're-prioritisation' of existing funding from within the Department of Prime Minister and Cabinet's (PMC) Indigenous Affairs programs. The current review of

the Indigenous Land Corporation and Indigenous Business Australia is specifically mentioned as providing an opportunity to consider some re-orientation of funding.

State and territory government settlement agreements are another avenue of potential funding identified within the report. But with such opportunities being difficult to forecast and available to only a few groups, it seems likely that in the short term any increase to funding for RNTBCs will be at the cost of existing programs and services.

### **Other Findings:**

#### *The rationalisation of NTRBs and recognition*

The report recommends against any rationalisation of NTRBs/SPs. It also suggests two options for the recognition process. Firstly, recognition could be streamlined so that the additional administrative costs are minimised. Alternatively, the recognition provision of the Act could be removed. Both options would likely require legislative amendments.

#### *Private agents*

The report suggests increased transparency and accountability measures within the system to help minimise disputes exacerbated by the actions of private agents, but such measures should not increase regulatory burdens. Such measures might include a register of native title practitioners, or an accreditation system and qualifications for native title solicitors

#### *Effective operation of the system*

The report suggests more and better coordination between all levels of government and within and between government departments to deliver more effective support to native title holders.

For the most part, the future of the native title system over coming decades that this report envisages is a positive one. In this future native title holders are well positioned to enjoy their rights, NTRBs/NTSPs have a clearly-defined ongoing role and the ability to respond to their

local circumstances, most RNTBCs have the capacity they need to meet their obligations and aspirations, and there is greater alignment between native title and broader Indigenous policy directions.

With much of the new government's Indigenous Affairs portfolio still in flux and a response to the review still pending, it is difficult to foresee how much of this vision will ultimately be realised.

If the final report is any indication, native title organisations are at the very least set to receive a desperately needed boost to funding to address chronic issues of capacity.

It remains to be seen whether RNTBCs will be able to achieve the levels of corporate and economic independence aspired to if other parts of the Indigenous policy infrastructure that support native title holders and their families are subsequently depleted by a major funding rearrangement.

The Government is currently considering the findings of the review and has advised that it will respond at an appropriate time.

A downloadable report is available on the website of the Department of the Prime Minister and Cabinet. Copies of public submissions to the Review are available on the Deloitte Access Economics website.