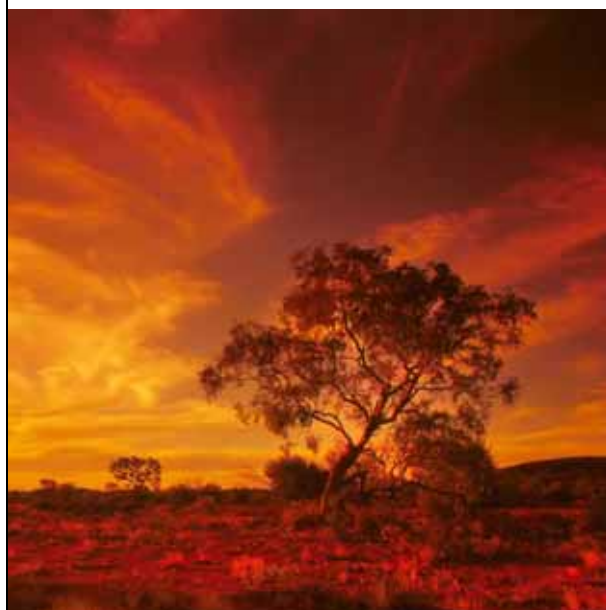


**A report into
the professional development needs of
Native Title Representative Body lawyers**

Final Report
7 April 2005



Richard Potok
with the Castan Centre for Human Rights Law
Monash University

PART A EXECUTIVE SUMMARY

1. Introduction

The High Court's 1992 decision in *Mabo* recognised native title as a property right unique to Indigenous Australians. To date, Commonwealth, State and Territory governments have invested over \$1 billion, and the Commonwealth continues to invest over \$100 million a year, in a system to resolve issues relating to this legal right.

The achievements of the native title system thus far have been significant: by January 2005, the courts had made 64 determinations of native title claims and parties had finalised 143 Indigenous Land Use Agreements and numerous other agreements. However, 90% of native title claims are yet to be resolved and, despite recent High Court decisions, there are still some substantial outstanding legal issues. It is clear that much work remains to determine existing claims and conclude negotiations.

The 17 independent Native Title Representative Bodies ('NTRBs') across Australia and their 76 in-house lawyers are the pivotal component of the native title system. The Commonwealth Parliament in the *Native Title Act* prescribed their unique role. NTRBs perform claim and negotiation work that involves liaising with diverse claimants, organising meetings and taking instructions from client groups in cross-cultural settings, often travelling long distances to remote areas. Once claim material is prepared, NTRB lawyers represent claimants in litigation, mediation and negotiations with well-resourced institutions, including corporations, government agencies and industry bodies. NTRB lawyers are responsible for preparing and representing at least 70% of existing native title claims. Other players in the native title system bear a far smaller burden, essentially limited to responding to claims initiated and brought by claimants represented by NTRBs. In addition to their claims and negotiation work, NTRBs are required to meet a variety of accountability, administrative and organisational requirements.

The performance of NTRBs and their lawyers is crucial to the effective functioning of the native title system. If the functioning of NTRBs is impaired, the native title system slows inexorably, impeding the fulfilment of Indigenous aspirations and industry development. In order for NTRBs to function properly, their lawyers must be well supported.

It is imperative, from an economic perspective, that the Commonwealth provides the necessary support for NTRB lawyers to realise its substantial historical and ongoing investment in the native title system. Oiling the wheels of the native title machinery by supporting NTRB lawyers is critical to furthering the Commonwealth's policy of settling native title claims by agreement as promptly as possible. The support of NTRB lawyers is essential in order to avoid delays (and hence additional cost) in the settlement of claims and to ensure that native title issues are resolved to the benefit of all stakeholders (Indigenous, government, industry and individual interest-holders).

This Project has sought to identify the particular types of support needed by NTRB lawyers. To achieve this, the Project has involved an extensive consultation process, as well as other background research, in order to evaluate:

- a. the core knowledge and skills required by NTRB lawyers

- b. the level to which NTRB lawyers believe they currently have the required core knowledge and skills (as well as the views of other participants in the native title system on this), and
- c. the necessary professional development tools to address any gaps identified.

The scope of the Project is limited to identifying strategies specifically relating to NTRB lawyers that can be implemented simply and cost-effectively to achieve both short- and long-term benefits. Several of the approaches discussed in this Report are also relevant to non-legal staff; however, exploring this aspect falls outside the Project brief. Questions about the structure of NTRBs and service delivery to native title claimants and holders more broadly are beyond the scope of the Project and the Project Team undertook no specific research into these matters. Similarly, while factors such as the state of native title jurisprudence and issues relating to Indigenous self-determination and the role of international human rights standards are acknowledged to be important to the operating environment of NTRBs, they are also beyond the scope of the Project. These factors may well be legitimate areas for future review. Finally, while funding issues are clearly relevant to the current Project, they are not the focus of this Report as they are comprehensively examined in prominent studies such as the Parker, Love-Rashid and Miller reports.

2. Key findings and analysis

This Report identifies two critical stumbling blocks for NTRBs – difficulties in the recruitment of in-house lawyers and in the retention of those lawyers. In particular, the research presented in the Report shows that there is a need within the NTRB system, in relation to lawyers, for proactive recruitment strategies, professional development opportunities and improved support structures. NTRB lawyers have consistently indicated that high turnover of legal staff and lack of coordinated systems for sharing information inhibit the delivery of legal services by NTRBs. Valuable corporate knowledge is lost or not utilised, and many lawyers are left feeling overwhelmed and dissatisfied.

At present in the NTRB system, recruitment typically occurs on a reactive basis – vacant positions are advertised after NTRB staff have given notice. Moreover, there is no structured system for developing expertise and only informal methods exist for facilitating communication among NTRB lawyers. Individual lawyers develop their own networks of contacts and mentors and their own systems for storing and sharing information. According to our research, the consequences of high turnover, recruitment difficulties (due to, among other things, a shrinking pool of experienced native title lawyers) and lack of structured support mechanisms include delays, duplication of work, less than optimum outcomes for all parties and undue stress for individual lawyers (which itself leads to high turnover and recruitment difficulties).

This Report highlights that NTRB lawyers seek formal professional development opportunities and improved support structures. It is clear that NTRBs at present do not have the time or resources to implement such training and support systems.

The need for professional support by NTRB lawyers has been raised previously. This Report clarifies the details of this need and identifies a variety of alternative and complementary strategies that target NTRB lawyers. Each of the strategies presented seeks to build, or provide tools to enhance, the capacity of NTRB lawyers and, thus, the NTRB system as a whole.

3. Recommendations

This Report proposes strategies directed at addressing the two key difficulties of recruitment and retention of NTRB lawyers, through:

- promoting working in the area of native title
- providing better professional development opportunities to NTRB lawyers, and
- improving support structures for NTRB lawyers.

It should be noted that the strategies presented in this Report are ordered thematically and not on the basis of importance or priority.

3.1 Recruitment: recommendations for promoting careers in the NTRB system

Research shows that NTRBs face serious difficulties in recruiting new and experienced lawyers. Over 90% of the NTRB lawyers interviewed commented on the difficulties in recruitment, as did 75% of NTRB chief executives interviewed.

Usually very few qualified applicants apply and a considerable proportion are often existing lawyers at other NTRBs. The movement of NTRB lawyers across the system is beneficial for various reasons, but it also has the unwanted effect of simply shifting a vacancy from one NTRB to another. Our research shows that difficulty in recruitment is a particularly serious issue in smaller cities and towns, where more than half of the current NTRB lawyers are located.

This Report highlights the substantial financial costs incurred where NTRBs are unable to recruit sufficiently experienced lawyers to fill vacant positions. In addition to the financial costs and reduced capacity generally, consequences of recruitment delays include interruption to claims and negotiation processes as well as adverse effects on relationships with clients.

Recommendation 1: Steps should be taken to increase the number of applicants for NTRB legal positions by promoting opportunities to work in the NTRB system, in particular through implementing the strategies proposed in this Report.

This Report proposes the following strategies to address these recruitment challenges:

Strategy 1 Introduce an NTRB student placement program, to raise awareness among law students of opportunities to work in the NTRB field. A pilot program was undertaken over the 2004-05 summer break with 18 students from various east coast universities placed at nine NTRBs around the country.

Strategy 2 Focus on promotion of careers in NTRBs to practising lawyers, to raise awareness of opportunities for work in the system.

Strategy 3 Engage a dedicated NTRB human resources manager, hosted by an independent university-based centre or commercial enterprise, to coordinate recruitment and retention strategies across the NTRB system.

Strategy 4 Promote native title work to barristers and consultant legal practitioners, to expand the pool of external counsel involved in native title matters.

3.2 Retention: recommendations for supporting lawyers in the NTRB system

Through our research it became clear that high turnover of NTRB lawyers is a critical problem for the functioning of NTRBs. Historical turnover figures are not available, however, it is noted that in the last six months around one in four lawyers left the system. The consequences of such high levels of turnover cannot be overstated. First, there are significant financial costs, often including the costs of hiring external counsel at many times the rate paid to internal legal staff, while replacement lawyers are sought. Other consequences include: loss of corporate knowledge and history, employment of inexperienced lawyers or premature promotion of junior lawyers, delays in progressing matters, and impaired relationships with clients and other parties.

Retention rates of NTRB lawyers are affected by many factors including lack of career paths, disillusionment with outcomes, onerous workloads, remote workplace locations, frustration with the necessity to perform non-legal tasks and dissatisfaction with the level of access to resources.

Recommendation 2: Steps should be taken to increase the retention of NTRB lawyers by focussing on the professional development of NTRB lawyers and enhancing support structures and programs available to them, in particular through implementing the strategies proposed in this Report.

This Report proposes the following strategies to increase the work satisfaction of NTRB lawyers through enhanced professional development opportunities:

Strategy 5 Develop an induction manual and induction training program to be undertaken by new recruits within their first six months, to introduce new NTRB lawyers to issues regarding client communities, cross-cultural and multi-client matters, as well as to provide an overview of key legal practice areas, Federal Court procedures and relevant anthropological principles.

Strategy 6 Establish an ongoing training program to expand the areas of expertise of NTRB lawyers in legal, cultural and commercial contexts and to enhance their ability to keep abreast of developments in the law and the native title system generally.

Strategy 7 Offer scholarships for post-graduate study to further enhance skills in particular areas, such as mining law and practice, mediation and negotiation, environmental law and advocacy. The first of these has been put in place with two NTRB lawyers currently undertaking Masters in International Mining Law and Policy at the University of Dundee in Scotland, under a newly-created Rio Tinto NTRB scholarship program.

Strategy 8 Arrange secondments to commercial law firms, to provide opportunities for the development of commercial practice skills and to build relationships in the private law sector.

- Strategy 9* Provide management training for senior NTRB lawyers, to equip them with the necessary skills to perform their leadership, management and governance responsibilities.
- Strategy 10* Implement performance evaluation systems, to assist in the identification of NTRB lawyers' professional development needs.
- Strategy 11* Facilitate greater NTRB input into the program for the annual native title conference, to enhance its value to NTRB lawyers.

This Report proposes the following strategies for improving the work environment of NTRB lawyers through the development of support structures:

- Strategy 12* Establish a dedicated NTRB information service, to facilitate greater communication among NTRB lawyers, provide access to a precedents database and circulate relevant advice and analytical materials to all NTRB lawyers.
- Strategy 13* Build relationships with law firms, to enhance the professional support available to NTRBs, such as through secondment of lawyers from private firms to NTRBs, mentoring of NTRB lawyers, running workshops for NTRB staff and providing advice on non-native title matters.
- Strategy 14* Create an NTRB mentoring and alumni network, to enhance access to professional support and advice.
- Strategy 15* Provide training opportunities for NTRB non-legal managers, to enhance management and leadership skills generally and in particular to ensure the implementation of systems necessary for the effective functioning of NTRB lawyers.
- Strategy 16* Provide professional development opportunities to NTRB field officers, to improve communication between NTRB lawyers and their clients.
- Strategy 17* Form a professional association for native title lawyers, to increase communication among NTRB lawyers.

4. Conclusion

Through the *Native Title Act* the Commonwealth has mandated the functions of NTRBs as part of the native title machinery. Oiling this machinery, by supporting NTRBs and their lawyers, is essential to capitalise on the \$1 billion investment made to date, and the more than \$100 million injected annually, into the native title system by governments. Investment in the professional development of NTRB lawyers is urgently required to avoid delays in resolving claims and agreements and to ensure that the level of certainty all parties require is achieved.

Our conclusion, based on findings from the consultation process, is that, in order for the native title system to operate more efficiently and effectively, NTRB lawyers need to be better supported in their professional capacities. They need a formalised system for

sharing knowledge and accessing expertise so they can avoid the duplication of work, inconsistency in approach and costly delays that often result under the current methods of operation.

This Report identifies the particular challenges faced by NTRBs in performing their legal functions, and proposes a series of strategies aimed at assisting NTRB lawyers to overcome these obstacles. The recommendations and each of the strategies proposed seek to build, or provide tools to enhance, the capacity of individual NTRB lawyers and, thus, of the NTRB system as a whole. This will enable the system to deliver results that will assist the economic and social empowerment of Indigenous communities, and enhance results for all stakeholders in the broader system.

Finally, it is important to note that irrespective of the outcome of current indications that the Government may wish to restructure the NTRB system in some way, the professional development strategies outlined in this Report are still both relevant and applicable. No matter what structure is decided upon, the lawyers working within the structure need to be adequately supported.