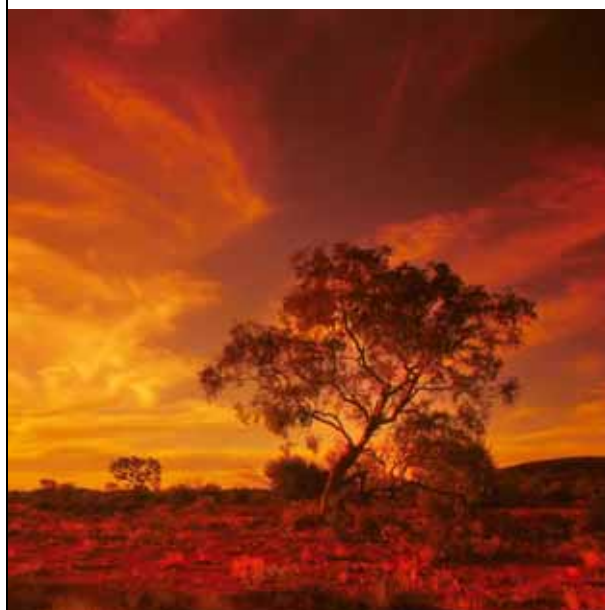


A report into the professional development needs of Native Title Representative Body lawyers

Final Report
7 April 2005



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with the Castan Centre for Human Rights Law
Monash University

DISCLAIMER

The Commonwealth of Australia, through the Office of Indigenous Policy Co-ordination and the National Native Title Tribunal (the Commonwealth), part-funded the Project Team to undertake the needs analysis research found in this Report. While the Commonwealth has commented to the Project Team on the research methods used and the reported outcomes, it expresses no views on the contents of the Report, nor does it necessarily agree with, or endorse, the recommendations contained in the Report.

The Commonwealth also makes no representations, either express or implied, as to the suitability of the information contained in the Report for any particular purpose; nor accepts any liability for any use of the information contained in the Report or any reliance on it.

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(I) Abbreviations

AIATSIS	Australian Institute of Aboriginal and Torres Strait Islander Studies
ALRA	<i>Aboriginal Land Rights (Northern Territory) Act 1976</i> (Cth)
ALRM	Aboriginal Legal Rights Movement
ATSIC	Aboriginal and Torres Strait Islander Commission ¹
ATSIS	Aboriginal and Torres Strait Islander Services; note that OIPC took over ATSIS' responsibilities in relation to native title matters in July 2004
Cape York	Cape York Land Council
Carpentaria	Carpentaria Land Council Aboriginal Corporation
Central Queensland	Central Queensland Land Council Aboriginal Corporation
Chief executives of NTRBs	Includes NTRB chief executive officers, executive directors and executive officers
CLC	Central Land Council, Native Title Unit
Field officers at NTRBs	Refers to field officers, project officers, Indigenous liaison officers, client development officers and equivalent positions
Future acts	Refers to proposed activities or developments that may affect native title
Goldfields	Goldfields Land and Sea Council Aboriginal Corporation
Gurang	Gurang Land Council Aboriginal Corporation
HREOC	Human Rights and Equal Opportunity Commission
ILUA	Indigenous Land Use Agreement
KLC	Kimberley Land Council
Lawyers at NTRBs	Includes solicitors, legal officers, senior legal officers, principal legal officers and articulated clerks; does not include those without legal qualifications nor qualified lawyers working in a non-legal capacity or those dealing exclusively with non-native title legal issues

¹ On 1 July 2003 ATSIS was established to take over the administrative functions of the Aboriginal and Torres Strait Islander Commission (ATSIC). During the 2003-04 financial year, ATSIS made all decisions on the administration of programs formerly the responsibility of ATSIC, while ATSIC's Board and Regional Councils set policies and priorities for these programs. On 15 April 2004, the Commonwealth Government announced its intention to abolish both ATSIC and ATSIS and distribute the programs and services ATSIS administered to mainstream Commonwealth Government agencies. The transfer of the vast majority of programs occurred on 1 July 2004; however, the abolition of both agencies was delayed by the Senate's referral of the ATSIC Amendment Bill to a committee (ATSIC, www.atsic.gov.au/ATSIS/default.asp at 30 March 2005).

<i>Native Title Act</i>	<i>Native Title Act 1993 (Cth)</i>
Ngaanyatjarra	Ngaanyatjarra Council
NILACs	National Indigenous Legal Advocacy Courses
NLC	Northern Land Council
North Queensland	North Queensland Land Council Aboriginal Corporation
NSW NTS	New South Wales Native Title Services
NTRB (or Representative Body)	Native Title Representative Body; note this term is used throughout the Report to refer to the 15 recognised NTRBs across Australia as well as the two service organisations receiving specific funding to perform some NTRB functions (NTS Victoria and NSW NTS)
NTS Victoria	Native Title Services Victoria
OIPC	Office of Indigenous Policy Coordination, Department of Immigration and Multicultural and Indigenous Affairs; note that OIPC took over ATSI's responsibilities in relation to native title matters in July 2004
PBCs	Prescribed Bodies Corporate
PLO	Principal legal officer
Project	An Analysis into the Professional Development Needs of Native Title Representative Body Lawyers
Queensland South	Queensland South Representative Body Aboriginal Corporation
RNTBCs	Registered Native Title Bodies Corporate
SWALSC	South West Aboriginal Land and Sea Council
Torres Strait	Torres Strait Regional Authority
Tribunal	National Native Title Tribunal
Yamatji	Yamatji Marlpa Barna Baba Maaja Aboriginal Corporation; Yamatji Land and Sea Council; Pilbara Native Title Services; note that for the purposes of this report, Pilbara Native Title Services and Yamatji Land and Sea Council are treated as one NTRB
1995 Parker Report	G Parker and others, <i>Review of Native Title Representative Bodies</i> , ATSIC, Canberra (1995)
1999 Love-Rashid Report	Senatore Brennan Rashid and Corrs Chambers Westgarth, <i>Review of Native Title Representative Bodies</i> , ATSIC (March 1999)
2001 Native Title Report	Aboriginal and Torres Strait Islander Social Justice Commissioner, <i>Native Title Report 2001</i> , HREOC (2001)

2002 ATSIC RNTBC Report	Anthropos Consulting Services, Ebsworth & Ebsworth and Senatore Brennan Rashid, <i>Research Project into the Issue of Funding of Registered Native Title Bodies Corporate</i> , Report prepared for ATSIC Native Title and Land Rights Centre (October 2002)
2002 Miller Report	B Miller, <i>Review of the Native Title Representative Body System at the request of the Minister for Reconciliation and Aboriginal and Torres Strait Islander Affairs</i> (October 2002)
2004 Anthropos Report	Anthropos Consulting Services, <i>Capacity of Anthropologists in Native Title Practice</i> , a report to the National Native Title Tribunal (April 2004)
2004 Parliamentary Inquiry	Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, <i>Inquiry into Native Title Representative Bodies</i> (2004)
2004 Thurtell Report	J Thurtell, <i>Review of practice and procedure in the conduct of on country hearings in native title cases for the Federal Court of Australia</i> (March 2004)
2004 Williams and Bauman Report	R Williams and T Bauman, <i>Indigenous Facilitation and Mediation Project: Directions, Priorities and Challenges</i> , AIATSIS (November 2004)

(II) Acknowledgements

In 2003, we approached the Commonwealth's Aboriginal and Torres Strait Islander Services ('ATSIS'), the National Native Title Tribunal (the 'Tribunal') and the Federal Court of Australia (the 'Federal Court') in relation to an investigation of Native Title Representative Bodies ('NTRBs' or 'Representative Bodies'). In particular, we sought to examine the opportunities for improving results for native title claimants and holders through the establishment of comprehensive support programs directed at lawyers working in Australia's 17 NTRBs. With the vision and support of Brian Stacey from ATSIS, Chris Doepel and Graeme Neate from the Tribunal and Warwick Soden and Louise Anderson of the Federal Court, the idea progressed to the needs analysis phase (the 'Project'). We are particularly grateful to each of them and their organisations and also to the project officers from the Office of Indigenous Policy Coordination ('OIPC')² and the Tribunal, for their support, advice and patience.

We wish to express our gratitude to each of the 211 people who participated in the consultation process, giving their time, insights and suggestions. We are especially grateful to the NTRB managers and staff who generously assisted us.

Our thanks also go to the host of the Project, the Castan Centre for Human Rights Law at Monash University, and to the Monash University Law School. We are particularly grateful to the other funders and supporters of the Project, including Allens Arthur Robinson, Arnold Bloch Leibler, the Australian National University, Chalk and Fitzgerald, Gilbert + Tobin, John Connelly and Partners, Laini Liberman, Lee Liberman, the Minerals Council of Australia, Nordia Foundation, Rio Tinto, the Scully Fund, Telstra, the University of New South Wales and the Victor Smorgon Charitable Trust.

We would also like to thank the Project's advisory group (comprising representatives from OIPC, the Tribunal, the Castan Centre for Human Rights Law, the University of New South Wales and NTRBs). The following people in particular deserve thanks for their ongoing advice and support: Tracy Barber, Ian Bryson, Andrew Chalk, Jennifer Clarke, Janet Cousens, Associate Professor Brendan Edgeworth, James Fitzgerald, Danny Gilbert, Sarah Gilbert, Anne Gray, Bruce Harvey, Professor Marcia Langton, Professor Garth Nettheim, Noel Pearson, Simon Rice, David Ritter, David Robb, Peter Seidel and Gabrielle Trainor.

The Project could not have been completed without the tireless work and support of our team led by our project manager and research associate, Monique Sweetland. Monique's involvement is evident in the design, co-ordination and data management of the Project and in the drafting of this Report; the value of her contribution cannot be overstated. Our office manager, Rebecca Shepherd, has provided us with excellent research and analysis support, in addition to logistical and technical assistance. Edwina Howell's writing and research skills were essential during the completion of the Report. They have been ably assisted over recent months by Lucy Adams, Laura Douglas, Lara Kostakidis-Lianos and Marika McAdam. To all of them, and the many University of New South Wales law students who also assisted, we are very grateful.

Our sincere appreciation also goes to all those who reviewed the various drafts of this Report.

Richard Potok, University of New South Wales
Melissa Castan, Castan Centre for Human Rights Law, Monash University
7 April 2005

² OIPC took over ATSIS' responsibilities in relation to native title matters in July 2004.

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.

PART B METHODOLOGY

1. Introduction

The Project commenced in May 2004 under the auspices of the Castan Centre for Human Rights Law at Monash University and involved an analysis of the professional development needs of Native Title Representative Body (NTRB)³ lawyers. The terms of reference for the Project required research into and evaluation of:

- 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 fill any gaps identified.

Aboriginal and Torres Strait Islander Services ('ATSIS'; later the Office of Indigenous Policy Coordination ('OIPC'))⁴ and the National Native Title Tribunal (the 'Tribunal') agreed to partially fund the Project. The Federal Court of Australia (the 'Federal Court') generously provided space in Melbourne where the Project Team⁵ could work. An advisory group comprising representatives from OIPC, the Tribunal, the Castan Centre for Human Rights Law, the University of New South Wales, and NTRBs (as appointed by ATSIS) was formed to oversee the development of the research methodology, and in particular the consultation process.

The research for the Project was undertaken primarily through a consultation process with NTRB lawyers, managers and other staff, as well as legal and other professionals who work or otherwise deal with NTRB lawyers.

2. Background Research

Beyond the consultation process, the Project Team carried out background research into relevant issues and existing resources and initiatives. This was done primarily through literature reviews and, to a lesser extent, through verbal discussions. The written materials reviewed were accessed from public sources (mainly government and other native title-related websites) or were provided by interviewees (or, in the case of NTRB organisational materials, by NTRB staff).

³ The term 'NTRBs' is used throughout the Report to refer to the 15 recognised NTRBs across Australia as well as the two service organisations receiving specific funding to perform some NTRB functions (NTS Victoria and NSW NTS).

⁴ On 1 July 2003 ATSIS was established to take over the administrative functions of the Aboriginal and Torres Strait Islander Commission (ATSIC). During the 2003-04 financial year, ATSIS made all decisions on the administration of programs formerly the responsibility of ATSIC, while ATSIC's Board and Regional Councils set policies and priorities for these programs. On 15 April 2004, the Commonwealth Government announced its intention to abolish both ATSIC and ATSIS and distribute the programs and services ATSIS administered to mainstream Commonwealth Government agencies. The transfer of the vast majority of programs occurred on 1 July 2004; however, the abolition of both agencies was delayed by the Senate's referral of the ATSIC Amendment Bill to a committee (ATSIC, www.atsic.gov.au/ATSIS/default.asp at 30 March 2005). OIPC took over ATSIS' responsibilities in relation to native title matters in July 2004.

⁵ Members of the Project Team are identified in the Acknowledgements section above.

The Project Team conducted research on the following topics:

- the history of the NTRB system and modifications to it
- the functions of NTRBs
- areas of native title law still to be resolved
- the content of existing NTRB induction programs or materials
- existing training courses and programs relevant to NTRB lawyers
- NTRB salary levels
- Prescribed Bodies Corporate ('PBCs')⁶
- issues affecting the NTRB system generally, and
- enrolment and completion rates of Indigenous students at Australian and New Zealand law schools.

In the preparation of this Report, the Project Team reviewed various reports and other research materials (see Appendix 1).

We are aware that there are a number of additional reports that are relevant to the performance of various NTRBs. However, OIPC has informed us that these are confidential and, therefore, were not available for our review.

3. Consultation process

The consultation process for the Project involved extensive interviews exploring issues relating to the terms of reference, plus further consultations seeking feedback on drafts of this Report.

3.1 Interviews

Interviews were carried out in accordance with Monash University ethics guidelines. Interviews with NTRB staff (including lawyers, managers, anthropologists and field officers⁷) were arranged by contacting management at each NTRB and seeking permission to interview willing staff.

Each interviewee received and signed an explanatory statement describing the Project's objectives and privacy undertakings.

For interviews with NTRB lawyers and managers, we used a detailed questionnaire as the basis for consultations (see Appendices 2 and 3). The questionnaires sought both quantitative and qualitative answers and formed the basis for face-to-face interviews. For interviews with non-NTRB participants, we used an open discussion format.

⁶ For a definition of PBCs, see Section 3.6.5 in Part C below.

⁷ 'Field officers' refers to field officers, project officers, Indigenous liaison officers, client development officers and equivalent positions. The role of field officers is generally to assist in communications between NTRBs and the communities they serve. Their role tends to be largely logistical, for example, helping to arrange meetings through contacting and providing transport for attendees, as well as organising times and locations. In some areas, they play a greater role in conveying information about communities to lawyers or others at NTRBs.

Richard Potok and Monique Sweetland conducted most of the interviews in person, although a small number were conducted by telephone. Detailed notes were taken during each interview. To ensure the validity and accuracy of the transcripts, all interviewees had the opportunity to view the transcript of their interview and amend as necessary.

Between May and December of 2004, the Project Team conducted interviews with 211 people, including 108 NTRB employees from 16 of the 17 NTRBs around the country.⁸ These included interviews with 68 of the 89 lawyers⁹ working in the system during the consultation period. Thirteen of those 89 lawyers had left the system by 31 December 2004.

The following tables present a breakdown of the interviewees. Table B1 shows those working at NTRBs during the consultation period and Table B2 refers to others interviewed.

Table B1: NTRB interviewees

Category	Total	Female	Male	Of ATSI descent
Lawyers excluding PLOs ¹⁰	52 ¹¹	28	24	4
PLOs	16	7	9	0
CEOs	12	1	11	9
General managers	2	0	2	1
Other ¹²	27	13	14	7

Table B2: Non-NTRB interviewees

Category	Total	Former NTRB lawyer	Former NTRB non-lawyer	Of ATSI descent
Solicitor or barrister	34	17	0	1
Non-legal consultant	4	0	3	0
Federal Court Judge or staff	10	2	0	1
Tribunal member or staff	11	3	0	1
Commonwealth government officers	8	1	1	0
State government officers	9	3	1	0
Mining industry personnel	13	0	0	0
Persons involved in education/research	4	0	3	1
Other	10	1	3	6
Total	103	26	11	10

⁸ One NTRB declined to participate.

⁹ This figure includes full-time and part-time lawyers. Only qualified legal practitioners and articled clerks are included in this category. Consequently, 'lawyer' at an NTRB includes principal legal officers, senior legal officers, legal officers, solicitors and articled clerks. It does not include those without legal qualifications; nor does it include qualified lawyers working in a non-legal capacity or those dealing exclusively with non-native title legal issues. Three of the lawyers counted as interviewed did not participate in face-to-face interviews but completed the questionnaire.

¹⁰ Principal legal officers are referred to throughout the Report as 'principal legal officers' or 'PLOs'.

¹¹ This includes one general manager who is also performing some legal duties in relation to native title matters.

¹² This includes NTRB anthropologists and field officers.

In addition to those who were interviewed, a further 13 NTRB lawyers provided brief background details, including age, tertiary qualifications and length of experience at NTRBs and in law more generally. With this information we were able to profile the lawyers in the NTRB system as at 31 December 2004 (see Part D).

3.2 Consultations on various drafts of the Report

In February and March 2005, we circulated drafts of the Report to OIPC, the Tribunal and the Project's advisory group, as well as to NTRBs and others. A total of 33 people provided feedback; this included comments from 12 NTRBs. The Project Team considered all written and verbal feedback and, where appropriate, incorporated suggestions into this Report.

4. Data analysis

Databases of all interviewee responses were created in order for data analysis to be conducted. All the data presented in this Report is based on this analysis. Separate databases were used for the various categories of interviewees.

PART C CONTEXT

1. Introduction

Although the achievements of the native title system have been significant, over 90% of native title matters are yet to be determined.¹³ It is clear that much work remains to be completed to fully resolve the existing claims by litigation or negotiation, and to manage future activities over claimed land and waters. There is also a continuing and growing need to address ‘second generation’ native title matters, such as the durability of agreements and the management of the entities that administer native title once determined.¹⁴

NTRBs and their lawyers are the pivotal component of the native title system. If their functioning is impaired, the system slows inexorably, impeding Indigenous and industry development. Oiling this machinery, by supporting NTRBs and their lawyers, is essential to capitalise on the estimated \$1 billion investment that governments have already made in the native title system.¹⁵

For some time, concerns have been expressed that NTRB lawyers lack adequate support. The professional development revolution that has taken place in law firms over the past decade has not yet been adopted comprehensively throughout the NTRB system. In recent years, law firms around the world have realised that the historical system of apprenticeship and on-the-job-training as the primary, and sometimes sole, form of developing lawyers’ skills is no longer suitable. It may have been appropriate in the past (before fax machines, word processors and emails), but today legal practice moves too quickly. To complement mentor relationships, law firms now deliver training, capture knowledge in the form of precedent databases and make other professional development opportunities and tools available. This is to ensure that lawyers can ‘hit the ground running’ and satisfy the needs of their clients, their employers and the courts.¹⁶

This Project seeks to apply these new approaches, and the benefits they deliver, to NTRBs. More specifically, the Project investigates opportunities for improving results for native title claimants and holders through the establishment of comprehensive support programs directed at lawyers working in the 17 independent NTRBs. This Part C sets out the rationale for this kind of investment in NTRB lawyers, by considering the costs, results of and outstanding matters in the native title system. Before presenting these current issues we outline the historical context of this Project.

¹³ At 19 January 2005, there were 64 determinations of native title (including 56 registered and 8 conditional determinations) and, at 13 January 2005, 641 applications (including 595 claimant, 26 non-claimant and 20 compensation applications) awaiting resolution (information provided by the Tribunal). Thus, of the 705 native title matters that have not been withdrawn or dismissed, almost 91% remain unresolved.

¹⁴ These bodies are called Registered Native Title Bodies Corporate; see Section 3.6.5 of this Part below.

¹⁵ Rio Tinto has estimated total Commonwealth, State and Territory expenditure on native title transactions between 1993 and 2004 at over \$926 million (B Harvey and E Fry, *What Cost Native Title?* (November 2003); Rio Tinto, Submission to the *Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund Inquiry into Native Title Representative Bodies* (2004) (‘2004 Parliamentary Inquiry’), p 5).

¹⁶ See Appendix 4 for an overview of the types of training and other professional development activities run by mid-level and large law firms.

Each of the issues discussed or referred to in this Part have a bearing on the operation of NTRBs, including: funding, the status of native title law, NTRB structural and corporate governance issues, representation of Aboriginal and Torres Strait Islander peoples' interests generally, timelines, multi-disciplinary aspects, future acts¹⁷ and post-determination issues (such as monitoring and evaluating outcomes and the operation of PBCs. However, it is beyond the scope of this Project to examine all the approaches that may be available to redress the difficulties relating to these issues. Rather, the Report is focused on identifying simple and cost-effective opportunities for improving results for native title claimants and holders through the establishment of comprehensive support programs directed at lawyers working in the NTRB system.

2. Historical context

2.1 Legal context

The background to the development of native title law as it stood at the end of 2004 is relatively well known and extensively documented.¹⁸ Nevertheless, what follows is a brief outline to demonstrate the challenges faced by lawyers practising in the system.¹⁹

The High Court's decision in *Mabo*²⁰ was the first recognition of native title in Australian common law, and set to one side the legal fiction that surrounded the expanded doctrine of *terra nullius* in Australia. The term 'native title' was used by the High Court to describe the pre-existing rights and interests of Indigenous peoples in land and waters, according to traditional laws and customs.

After *Mabo*, in response to concerns about the continuing validity of non-Indigenous interests in land, the Commonwealth enacted the *Native Title Act 1993* (Cth) ('*Native Title Act*') to provide procedures for both Indigenous and non-Indigenous people to determine whether native title exists over certain lands and how dealings in that land could proceed.²¹

During the early years of the operation of the *Native Title Act*, it became clear that some provisions would have to be amended if the Act was to achieve its purposes. Further, after the High Court decision in *Wik*²² made it clear that pastoral leases, at least in Queensland, did not necessarily extinguish native title, additional amendments were proposed. These amendments came to be known as the Commonwealth's 'ten point plan', although the scope of the amending Act was far more complex than this title suggested.

¹⁷ For an explanation of future acts, see Section 3.6.3 of this Part below.

¹⁸ See, for example, R Bartlett, *Native Title in Australia* (Sydney: Butterworths, 2nd ed, 2004); H McRae, G Nettheim, L Beacroft and L McNamara, *Indigenous Legal Issues: Commentary and Materials* (Sydney: Lawbook Co., 3rd ed, 2004); and M Perry and S Lloyd, *Australian Native Title Law* (Sydney: Lawbook Co, 2003)

¹⁹ For a discussion on the 'specialty' of native title law, see D Ritter and M Garnett, 'Building the Perfect Beast: Native Title Lawyers and the Practice of Native Title Lawyering' (1999) *Land, Rights, Laws: Issues in Native Title*, Issues Paper No. 30.

²⁰ *Mabo v Queensland* (No 2) (1992) 175 CLR 1 ('*Mabo*').

²¹ For a perspective of the political and parliamentary processes that surrounded the enactment of the *Native Title Act*, see R Tickner, *Taking a Stand* (Sydney: Allen and Unwin, 2001).

²² *Wik Peoples v The State of Queensland and Ors* (1996) 187 CLR 1.

The *Native Title Amendment Act 1998* (Cth) was eventually passed in 1998. Its effect was to increase the procedural requirements for native title claimants and increase the range of activities that could take place over native title land without requiring consent of native title holders. The amendments also further defined the statutory recognition of NTRBs.

Cases such as *Fejo*,²³ *Wilson v Anderson*,²⁴ *Ward*,²⁵ *Yorta Yorta*²⁶ and *Yarmirr*²⁷ considered the use of the principles of native title developed by the High Court in the *Mabo* and *Wik* cases, compelling a reassessment of aspects of native title law and practice.²⁸ Despite these developments, Indigenous rights and interests in land persist and remain an important aspect of Australian land law. The recent cases have emphasised the role of the *Native Title Act*, as opposed to the common law, in the definition, recognition and extinguishment of native title.²⁹

2.2 Relevant reports and investigations

NTRBs are an integral part of the machinery that was put in place to resolve native title issues. The system relies on interlocking elements comprising the Tribunal, the Federal Court and NTRBs.³⁰ The operations and functions of NTRBs have been reviewed in the 1995 Parker Report, the 1999 Love-Rashid Report and the 2002 Miller Report. In addition, the Aboriginal and Torres Strait Islander Social Justice Commissioner reviews the entire native title system each year in his Native Title Report.³¹ Further to these, in 2004, the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund commenced an inquiry into the capacity of NTRBs to discharge their responsibilities under the *Native Title Act*.³² Below is a short overview of each of these key investigations of the NTRB system.

These reviews and investigations are commonly referred to in the literature and discussions generally relating to NTRBs; thus, the overviews are provided by way of background. They are not intended as an introduction of the issues to be discussed in this

²³ *Fejo and Another on behalf of the Larrakia People v Northern Territory of Australia and Another* (1998) 195 CLR 96.

²⁴ *Wilson v Anderson* (2002) 213 CLR 401.

²⁵ *Western Australia v Ward and Others* (2002) 191 ALR 1.

²⁶ *Members of the Yorta Yorta Aboriginal Community v Victoria and Others* (2002) 194 ALR 538.

²⁷ *Commonwealth v Yarmirr; Yarmirr v Northern Territory* (2001) 208 CLR 1.

²⁸ There is not scope in this Report to elaborate on the aspects of law raised in these cases, but see: M Tehan, 'A Hope Disillusioned, an Opportunity Lost? Reflections on Common Law Native Title and Ten Years of the *Native Title Act*', (2003) 27(2) *Melbourne University Law Review*; and N Pearson, 'Land is Susceptible of Ownership' in M Langton, M Tehan, L Palmer and K Shain (eds), *Honour Among Nations?* (Melbourne: Melbourne University Press, 2004).

²⁹ For insight into claimants' perceptions of these developments see R Williams and T Bauman, *Indigenous Facilitation and Mediation Project: Directions, Priorities and Challenges*, AIATSIS (2004) ('2004 Williams and Bauman Report'), p 4.

³⁰ OIPC, Submission to the 2004 Parliamentary Inquiry, p 5.

³¹ See HREOC, www.hreoc.gov.au/social_justice/nt_reports.html at 1 April 2005.

³² See 2004 Parliamentary Inquiry, www.aph.gov.au/senate/committee/ntlf_ctte/rep_bodies/index.htm at 1 April 2005.

Report. However, the reviews do raise many concerns also identified through the consultation process undertaken for this Project.

2.2.1 1995 Parker Report

In November 1994, ATSIC commissioned Guy Parker to chair a review committee to examine the effectiveness of Representative Bodies, addressing:

- staffing issues
- measures which maximise appropriate native title services to Indigenous people, and
- the appropriateness of financial and administrative arrangements then in place for NTRBs.³³

The report begins with a vision statement that presents several important assumptions about the operation of the NTRB system. These are:

- that there was a clear intention in the drafting of the *Native Title Act* that “Indigenous native title parties should have maximum flexibility in the representation of their interests”; however, “this equitable goal has costs in terms of reduced efficiency and in an unintended potential to fuel rather than ameliorate disputes among native title parties in a particular area”
- support for NTRBs is crucial to “the sustained development of a just and credible native title regime”, and
- if the process breaks down for lack of resources, ultimately no-one’s interests will be served.³⁴

The report indicated a “strong view” that “the future workability of the *Native Title Act 1993* is critically dependent on the existence of efficient and effective Native Title Representative Bodies.”³⁵ A third of the report’s recommendations dealt with the need for adequate funding of NTRBs. A key position taken by the review committee was that Indigenous Australians should “no longer be regarded as obstacles to development or even as spectators or occasional beneficiaries of development: Aboriginal and Torres Strait Islander people are, by virtue of the *Mabo* decision and the *Native Title Act*, key stakeholders in Australia’s future.... Native title is a fact of life for all of us and equitable, efficient processes will therefore serve *all* Australians well”.³⁶

2.2.2 1999 Love-Rashid Report

In 1998, Senatore Brennan Rashid in conjunction with Corrs Chambers Westgarth were commissioned by ATSIC to review the relationship between funding levels and functions of

³³ The terms of reference for the review encompassed:

- a survey of NTRBs including data on claims researched and lodged with the Tribunal, geographic coverage of NTRBs, the relationship of NTRBs to other bodies, and the responsiveness of NTRBs to issues brought to their attention
- assessment of the effectiveness of NTRBs in terms of their functions and responsibilities under the *Native Title Act*, and
- identification of management and funding strategies to address problems apparent from the review (G Parker and others, *Review of Native Title Representative Bodies*, ATSIC, Canberra (1995) (‘1995 Parker Report’), p 1).

³⁴ 1995 Parker Report, p x.

³⁵ *Ibid*, p iii. NTRBs were described as “the workhorses of the native title regime” in the report (1995 Parker Report, p x).

³⁶ *Ibid*, p xii.

NTRBs and the effect of the 1998 amendments to the *Native Title Act* on funding and resource requirements. The review did not focus on “whether any particular NTRB is in fact fulfilling its required functions, rather it [was] focused on the capacity to do so”.³⁷ The key findings of this report were:

- workloads of NTRBs were significantly higher than allowed for by then-present funding
- corporate governance within NTRBs was generally deficient, and
- shortcomings of NTRBs imposed considerable costs on the wider community.³⁸

The 1999 Love-Rashid Report identified many examples of the statutory obligations and funding environment of NTRBs that continue to exacerbate NTRB operational difficulties. Three examples that highlight the challenges facing NTRB lawyers follow. First, the report identified that funding inadequacies have implications for the ability of Representative Bodies to satisfactorily perform their statutory functions.

Secondly, the report suggested the 1998 amendments to the *Native Title Act* shifted the emphasis of the role of NTRBs: “there is a clear shift in emphasis here from a body which is *representative* of Aboriginal and Torres Strait Islander people generally, to a body that is able to satisfactorily *represent those people* and is able to effectively consult with broader Aboriginal and Torres Strait Islander interests”.³⁹ The report noted the overlap of these obligations “where the interests of traditional owners and the rest of an Aboriginal or Torres Strait Islander community are opposed”.⁴⁰

Thirdly, the report noted that the *Native Title Act* in practice entrenches the requirement on an NTRB to represent all claims (even those of low merit), despite the contradictory legislative directive to make reasonable efforts to resolve competing or overlapping claims. The report argues that this directive “runs contrary to the need to allocate limited resources to the most productive ends” and necessitates proper policies to manage these conflict situations.⁴¹ Further, there are legal and professional ethical constraints on lawyers acting for competing claimants.

2.2.3 2002 Miller Report

In July 2002, ATSIC commissioned Bill Miller to undertake a review of some aspects of the NTRB system at the request of the Minister for Reconciliation and Aboriginal and Torres Strait Islander Affairs. The review was to address eight terms of reference relating to:

- the Minister’s ability to fulfil his obligations under the *Native Title Act*
- ATSIC’s ability to determine appropriate funding processes and allocations for NTRBs, and
- the adequacy of the constitutional arrangements of NTRBs.⁴²

³⁷ Senatore Brennan Rashid and Corrs Chambers Westgarth, *Review of Native Title Representative Bodies*, ATSIC (March 1999) (‘1999 Love-Rashid Report’), p 12.

³⁸ 1999 Love-Rashid Report, p 1.

³⁹ *Ibid*, p 28. For further discussion on this see: T Summerfield, ‘Native Title Representative Bodies under the Native Title Act Amendments: A Chance to Excel?’ (June 2000) 7(2) *Murdoch University Electronic Journal of Law*, www.murdoch.edu.au/elaw/issues/v7n2/summerfield72_text.html at 1 April 2005.

⁴⁰ 1999 Love-Rashid Report, pp 28-29.

⁴¹ *Ibid*, pp 22-23.

⁴² B Miller, *Review of the Native Title Representative Body System at the Request of the Minister for Reconciliation and Aboriginal and Torres Strait Islander Affairs* (October 2002) (‘2002 Miller Report’).

More specifically, the review found that:

- all of the Minister's responsibilities under the *Native Title Act* had been met, with the exception of the requirement to table the annual reports of NTRBs in both Houses of Parliament⁴³
- the strategic plan of each NTRB met the requirements of the *Native Title Act* but varied in quality, particularly in relation to information provided on objectives, strategies, performance and financial plans; the review made specific note that strategic plans of a large number of commercial companies similarly lacked some of these important details
- the strategic plans of NTRBs were predominantly general in nature and mostly did not contain output and outcome targets that enabled strategic workload planning
- neither the strategic plans, funding applications or annual reports of NTRBs contained sufficient information to enable ATSIC to base its funding allocations on quantifiable outputs/outcomes; this also inhibited ATSIC's ability to compare performance across NTRBs
- ATSIC funding to NTRBs addressed known native title funding needs but it raised a concern that such funding was not fairly distributed among NTRBs on the basis of relative need, and
- NTRBs' constitutional provisions did not inhibit the delivery of professional native title services to clients; however, the review identified several ways to improve constitutions and thereby service delivery.

2.2.4 HREOC Native Title Reports

Since 1994, the Aboriginal and Torres Strait Islander Social Justice Commissioner has published a detailed annual report into the functioning of the native title system. The 2001 report examined the role and functioning of NTRBs in some detail, highlighting funding shortfalls in particular.⁴⁴ In the 2003 Native Title Report, the Commissioner briefly examined the operation of NTRBs and identified under-funding of NTRBs as undermining the agreement making process and consequently constraining the broader benefits flowing from native title agreements.⁴⁵ The 2004 Native Title Report is to be released in April 2005.

2.2.5 2004 Parliamentary Inquiry into NTRBs

In May 2004, the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund sought submissions to an inquiry into the capacity of NTRBs to discharge their duties under the *Native Title Act*. Submissions were still being received at the date of publication of this Report and the findings of the Inquiry have not yet been released. The individual submissions provide a detailed picture of the operating environment of NTRBs and raise a wide range of issues of concern to those working in the

⁴³ Only one annual report had not been tabled.

⁴⁴ Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2001* (2002) p 67.

⁴⁵ Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2003* (2004) pp 159-60.

system. As at 7 April 2005, 30 submissions had been received by the Committee. This includes nine submissions from eight different NTRBs.⁴⁶

In addition to the above reports and reviews, four more recent projects have been undertaken that reflect on the work environment of NTRBs. An outline of each of these is presented below.

2.2.6 ATSIC NTRB Capacity Building Program

The NTRB Capacity Building Program was established by ATSIC to assist NTRBs to operate effectively under the legislative obligations imposed by the 1998 amendments to the *Native Title Act*. The program commenced on 1 January 2002 with additional Commonwealth funding of \$86 million over four years.⁴⁷ Of this, \$11.6 million was allocated to the NTRB system.⁴⁸

As part of exploring options for building the capacity of NTRBs, the program identified the following challenges facing NTRB professional staff:

- increasing workloads
- influence of external institutions on resource allocation in NTRBs
- the requirement on NTRBs to balance external demands and Indigenous community expectations in a volatile political landscape
- recruitment difficulties due to organisational complexity and remoteness
- accountability requirements
- professional inexperience
- limited knowledge base
- high staff turnover, and
- a decreasing pool of external experts available to assist in native title matters.⁴⁹

To date the program has mostly focused on reporting and governance issues in NTRBs, through implementing recommendations of the 2002 Miller Report.

2.2.7 2004 Indigenous Facilitation and Mediation Project

In November 2004, Rhiân Williams and Toni Bauman delivered a report on the outcomes and findings of workshops conducted as part of the Indigenous Facilitation and Mediation Project. These workshops sought to explore Indigenous dispute resolution and decision-making processes as an aspect of the responsibilities of NTRBs under the *Native Title Act*. The report focused on the outcomes of a series of workshops held during 2004 with NTRB

⁴⁶ Submissions were received from ALRM, Goldfields, Ngaanyatjarra, NSW NTS, NTS Victoria, SWALSC, Torres Strait and Yamatji. Note ALRM prepared two submissions: one on behalf of the organisation generally and one from the Native Title Unit (which is responsible for performing NTRB functions). For a full list of the submissions received by the Committee as at 7 April 2005, see Appendix 1 to this Report. Submissions can be viewed at www.aph.gov.au/senate/committee/ntlf_cte/rep_bodies/submissions/sublist.htm at 1 April 2005.

⁴⁷ ATSIC Native Title and Land Rights Centre, *Report of the NTRB Leaders Forum* (November 2001) p 2.

⁴⁸ ATSI, *Annual Report 2003-04*, p 60 (Table 2.4). A further \$6.0 million was also allocated to NTRBs (over four years) through the Strategic Priority Claims Resolution program (ATSI, *Annual Report 2003-04*, p 60 (Table 2.4)).

⁴⁹ ATSIC Native Title and Land Rights Centre, 'Draft Framework Paper: NTRB Capacity Building Program' in *Report of the NTRB Leaders Forum* (November 2001) pp 3-4.

staff and chief executives. Topics covered in the workshops included sources of conflict, resource issues, necessary training and skills for effective dispute management. The recommendations in the report emphasised the need to develop and enhance the procedural expertise of NTRBs in managing negotiation processes.

Although the report presented a wide variety of issues identified during the workshops, the following are of particular relevance to the role of NTRB lawyers:

- the existence of “an overarching dispute between Aboriginal customary laws and non-Indigenous common law” which “requires Indigenous peoples to do business in non-Indigenous ways”⁵⁰
- concerns about the equity of agreements “which may require Indigenous parties to forego their rights in relation to compensation for activities undertaken by non-Indigenous parties without proper regard to the impact on native title”,⁵¹ and
- Indigenous participants in the system feeling pressured to resolve issues without a thorough understanding of the range of matters involved, for reasons such as the imposition of timelines seen to meet non-Indigenous agendas.⁵²

2.2.8 2004 Report on the Capacity of Anthropologists in Native Title Practice

Beginning in October 2003 and at the request of the Tribunal, Anthopos conducted a survey of anthropologists working in native title. The survey group included those employed by NTRBs as well as consultants and academics. The terms of reference for the review required an assessment of the following:

- the present roles that anthropologists play in native title processes and their preparedness for those roles
- the required skill sets for different professional services
- the capacity of present Australian anthropological consultants to meet the need for field-based reporting and analysis in native title proceedings, including specifically, ‘connection reporting’,⁵³ and
- the profile of graduates in anthropology taking up salaried positions relating to native title.⁵⁴

The report, released in April 2004, focused on the major professional issues faced by anthropologists working in the native title field. This included issues regarding professional development, career paths, attitudes towards long term work in the area, and the challenges in the interdisciplinary relationships of lawyers and anthropologists. The report provided a profile of anthropologists working in the area, looking at age, gender, experience, qualifications and employment arrangements; it also examined the issue of supply and demand. The report also looked at the broader context of native title anthropology in terms of the nature of the expertise required in providing anthropological services to NTRBs.

⁵⁰ 2004 Williams and Bauman Report, pp 4 and 5.

⁵¹ *Ibid*, p 4.

⁵² *Ibid*, p 6.

⁵³ See Section 3.2 of this Part below.

⁵⁴ Anthopos Consulting Services, *Capacity of Anthropologists in Native Title Practice* (2004) (‘2004 Anthopos Report’), p 7.

The report considers the relationship between lawyers and anthropologists, and finds that the relationship between these professions is “not infrequently an uncomfortable one” in native title practice.⁵⁵ The report points out that:

- common anthropological approaches are not always appropriate in the native title context, particularly in relation to preparation of connection reports
- there is a need for anthropologists to better understand the role of expert witnesses as required under Federal Court guidelines, and
- inappropriate instructions and timelines have been given to anthropologists by NTRB lawyers, perhaps demonstrating a lack of understanding about anthropological methods.⁵⁶

2.2.9 2004 Review of Practice and Procedure in the Conduct of On Country Hearings

In June 2003, the Federal Court engaged John Thurtell to inquire into the efficiency and effectiveness of ‘on country’ native title hearings, which included looking into the following:

- the methods used to take evidence in native title cases
- the causes of excessive costs and delays, and the available options for reducing such costs and delays
- the procedures and case management initiatives utilised by the Federal Court to manage the conduct of native title hearings, and
- the options for gathering evidence.

Although the focus of the report was on case preparation, particularly in relation to ‘on country’ hearings, many of the findings of the report are consistent with those of this Project. In particular, the 2004 Thurtell Report concluded that “the management of native title cases and the achievement of outcomes is very dependent upon the availability and commitment of well prepared, skilled and appropriately resourced representatives for all involved”.⁵⁷

There is a wealth of other research and materials that identify and explore issues relevant to the legal function of NTRBs. These include individual NTRB annual reports, annual reports of the Tribunal, reports commissioned by ATSIC/ATSIS and the Federal Court, and other materials referred to in Appendix 1 to this Report.

3. Current context

3.1 The native title system

In 1992, the High Court’s *Mabo* decision recognised native title as a property right unique to Indigenous Australians. Following this, in 1993 in the *Native Title Act* and further through amendments in 1998, the Commonwealth Government developed a framework through which interests in, and access to, land and waters could be recognised and

⁵⁵ 2004 Anthropos Report, pp 6, 39 and 41. The report explains one of the factors for this “discomfort” which is the perception by anthropologists of a “widening schism between native title as shaped by the *Native Title Act* and...‘native title’ as it exists within the ‘Aboriginal domain’” (2004 Anthropos Report, p 39).

⁵⁶ 2004 Anthropos Report, p 41.

⁵⁷ J Thurtell, *Review of practice and procedure in the conduct of on country hearings in native title cases for the Federal Court of Australia* (March 2004) (‘2004 Thurtell Report’), p 3.

reconciled.⁵⁸ The key agencies of the native title system at the Commonwealth level are the Federal Court, the Tribunal and OIPC (which funds and is responsible for NTRBs). Under the authority of the *Native Title Act*, the Federal Court adjudicates claims, the Tribunal administers and mediates matters and NTRBs represent Indigenous interests. Though each agency performs a different function in the resolution of native title matters, they are inextricably linked and constitute an inter-dependent system.⁵⁹ The effective operation of the native title machinery demands that all elements are properly resourced.

Yet, it is NTRBs that are the 'linchpins' of the native title system:

*[They] are the...crucial intercultural mediators between indigenous Australians with a native title interest in land and all others. The workability of the [Native Title] Act both for indigenous and non-indigenous interests, will ultimately depend on NTRBs being able to fulfil their statutory functions efficiently and effectively.*⁶⁰

As mandated by the *Native Title Act*, the 17 existing NTRBs carry out substantive claim and negotiation work.⁶¹ OIPC estimates that between 70% and 90% of claims are represented by NTRBs, either directly by in-house lawyers or indirectly through outsourcing to external lawyers.⁶² In addition to their claim and negotiation work, NTRBs have extensive accountability, administrative and organisational responsibilities.⁶³

3.2 The role of NTRB lawyers

Even before the 1998 amendments which expanded the range of functions to be performed by NTRBs, it was recognised that NTRBs were already undertaking a large variety of duties on behalf of native title claimants and interests.⁶⁴ It is clear that the NTRB legal function is fundamental to the native title system; generally, other players in the system are merely reacting to the claims initiated and brought by claimants represented by NTRBs.⁶⁵ As native title claimants bear the burden of proving native title, the workload of NTRB lawyers is substantial. Under the *Native Title Act*, NTRB lawyers are required to perform a wide variety of legal functions and tasks, including:

- preparing and lodging claims
- confirming claimant group membership and ensuring applications are properly authorised
- assisting clients in consultations, mediations, negotiations and other proceedings

⁵⁸ The objects of the *Native Title Act* are (a) to provide for the recognition and protection of native title, (b) to establish ways in which future dealings affecting native title may proceed and to set standards for those dealings, (c) to establish a mechanism for determining claims to native title and (d) to provide for, or permit, the validation of past acts, and intermediate period acts, invalidated because of the existence of native title (see Section 3 of the *Native Title Act*).

⁵⁹ OIPC, Submission to the 2004 Parliamentary Inquiry, p 5. Other stakeholders include State and Territory agencies and the Indigenous Land Corporation.

⁶⁰ 1995 Parker Report, p 1.

⁶¹ See sections 203B, 203BB, 203BE, 203BF, 203BG, 203BH and 203BJ of the *Native Title Act*.

⁶² OIPC, personal communication, December 2004.

⁶³ See sections 203BI, 203BJ, 203DA and 203DC of the *Native Title Act*.

⁶⁴ 1995 Parker Report, p 7.

⁶⁵ It is worth noting that in relation to some matters NTRBs have a 'reactive' role, such as future act notices (for a definition of future acts, see n. 67, non-claimant applications and expedited procedure applications).

- representing clients in proceedings in the Tribunal, Federal Court and State and Territory courts and tribunals
- responding to non-claimant applications⁶⁶
- notifying clients with native title interests of proposed future acts (see Part C, Section 3.5.3) and responding to future act notices⁶⁷
- representing clients in agreement making
- dealing with relevant heritage and site clearance matters
- establishing and servicing PBCs (generally until the first annual general meeting⁶⁸), and
- establishing and servicing corporations and trusts to deal with aspects of agreements.⁶⁹

Gathering information to support a native title claim is one of the more labour intensive of NTRBs' tasks. It requires confirming the identity and authority of claimant group members, identifying the claimed area, identifying evidence of traditional laws and customs connecting people to land, as well as analysing complex tenure history material to investigate issues of possible extinguishment and previous claims. NTRB lawyers are required to organise meetings, take instructions from client groups, negotiate with other parties and prepare court submissions. They are also often required to manage conflict within or between client groups.

NTRB lawyers also manage the preparation and collation of anthropological and historical materials, commonly referred to as 'connection reports'. Often external consultants are engaged to prepare these reports.⁷⁰

Once claim material is prepared, NTRB lawyers represent claimants in litigation, mediation and negotiations. This involves engaging with well-resourced institutions including corporate and government agencies and industry bodies. Workloads in native title litigation are considered by many to be analogous with large commercial litigation.

The role of NTRB lawyers in agreement making or negotiation is wide-ranging and requires a diverse range of skills. These skills can be called upon in a number of contexts: in settlement of claims; in relation to future acts to which the right to negotiate applies; in the making of Indigenous Land Use Agreements (ILUAs); and in dealing with relevant

⁶⁶ A non-claimant application is defined by the Tribunal as "an application made by a person who does not claim to have native title to an area but who seeks a determination that native title does or does not exist in the area" (Tribunal, www.nntt.gov.au/applications/apps_landing.html at 3 February 2005).

⁶⁷ Proposed activities or developments that may affect native title are known as 'future acts'. Future act notices are public notices published by the Commonwealth, a State or Territory governments to notify those with an interest in the respective area of the proposed activity or development (Tribunal, www.nntt.gov.au/futureact/index.html at 3 February 2005).

⁶⁸ The date of the first annual general meeting is determined by the rules of the particular organisation but usually occurs on or around the first anniversary of the determination that native title exists.

⁶⁹ The types of matters mentioned by NTRB managers as achievements of their organisations indicate further areas of work performed by NTRB lawyers. Some of those mentioned include: amalgamation of claims; building relationships with key respondent parties; development of issues-based and claims-based ILUAs and templates; development of programs for assessing the viability of claims; establishment of PBCs; improvements to internal administrative and organisational arrangements; and legislative reform.

⁷⁰ The 2004 Williams and Bauman Report notes the importance of this aspect of an NTRB lawyer's role and recommends that a workshop be organised to facilitate lawyers and researchers developing joint approaches to the preparation and use of connection materials (2004 Williams and Bauman Report, p ix).

procedural rights. Indeed, dealing with future act notices is also highly labour intensive, due to the frequency with which such notices are received and the time limits that must be met in relation to them.

These roles constitute the facilitation and assistance function required of NTRBs by the *Native Title Act*.⁷¹ However, the extensive and continuing workload involved in meeting the other prescribed functions of NTRBs – including those relating to ensuring institutional compliance with corporate governance regimes – should not be overlooked.⁷² Some NTRBs have broader functions prescribed by their constitutions. For these organisations, balancing the representation of their clients (in a legal advocacy sense) with their responsibility to the community more generally adds further complexity.

3.3 Challenges faced by NTRB lawyers

It appears that the responsibilities and stresses of NTRB lawyers exceed those normally experienced in legal practice. In addition to heavy workloads, NTRB lawyers face a number of challenges that do not arise in mainstream practice. These include:

- the difficulties of cross-cultural settings
- the instability of native title jurisprudence
- onerous evidentiary requirements
- a multiplicity of State, Territory and Commonwealth statutory requirements impacting upon native title negotiations
- the issue of ‘who is the client’ (whether claimant or employer, individual claimant group or regional Indigenous community more broadly), and
- the absence of basic communication infrastructure in remote locations.⁷³

In relation to the statutory framework Justice Kirby of the High Court warned, “[d]iscovering the path through this jungle requires navigational skills of a high order.”⁷⁴

In recognition of this – and the fact that without sufficient support for NTRB lawyers the proper functioning of NTRBs and, therefore, the entire native title system is hindered – the Government allocated \$11.6 million to the NTRB Capacity Building Program in its budget allocations for 2001-2002 (to be spent over the following four years).⁷⁵ Funding is set to expire at the end of the financial year. As yet, no program specific to NTRB lawyers has been implemented.

⁷¹ See section 203BB.

⁷² These include functions relating to certification, dispute resolution, notification, agreement making and internal review (see *Native Title Act* sections 203BE to 203BJ). See also 1999 Love-Rashid Report, p 23.

⁷³ These factors can make it difficult for timelines in respect of native title claim negotiations and mandated mediation to be met. The Aboriginal and Torres Strait Islander Social Justice Commissioner has warned that “short timeframes are a serious impediment to capacity development within traditional owner groups and threaten any opportunity at achieving sustainable development” (Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2003* (2004) p 34.

⁷⁴ *Wilson v Anderson* (2002) 213 CLR 401, p 454. See also comments from former High Court Judge, Justice Gaudron who noted that “[t]here is no more demanding or difficult area of law” when referring to the native title field: Hon. Mary Gaudron QC, Speech delivered in February 2004 at the launch of M Perry and S Lloyd, *Australian Native Title Law* (Sydney: Lawbook Co, 2003).

⁷⁵ ATSIIS, *Annual Report 2003-04*, p 60.

3.4 Cost of the system

Each year, the Commonwealth spends over \$100 million on the operation of the system.⁷⁶ The Commonwealth's total expenditure on the system in 2003-04 was estimated to be over \$110 million, broken down as follows:⁷⁷

Funding Category	Body/Program	Expenditure	Total
Procedural	National Native Title Tribunal Federal Court of Australia	\$32.0m ⁷⁸	\$42.6m
		\$10.6m ⁷⁹	
Claimant	NTRBs Strategic Priority Claims Resolution ⁸⁰ NTRB Capacity Building	\$47.8m ⁸¹	\$53.9m ⁸⁴
		\$2.5m ⁸²	
		\$3.6m ⁸³	
Non-Claimant Parties	Respondent Parties Commonwealth Government	\$10.0m ⁸⁵	\$16.0m
		\$6.0m ⁸⁶	
total			\$112.5m

Rio Tinto, a major stakeholder in the system, has calculated total Commonwealth, State and Territory expenditure on native title transactions between 1993 and 2004 to be over \$926 million.⁸⁷ However, this figure is based on incomplete data. On the basis of these gaps in identifiable expenditure, the real cost to governments of the native title system has been estimated at two to four times this amount.⁸⁸ It should be noted that this does not include expenditure by private sector parties.

⁷⁶ Based on figures for 2001-02 to 2004-05 provided by the Attorney General's Department on 21 January 2005.

⁷⁷ Note this figure does not include expenditure on native title by State or Territory governments.

⁷⁸ Figure provided by the Attorney General's Department on 24 January 2005.

⁷⁹ *Ibid.*

⁸⁰ The Strategic Priority Claims Resolution ('SPCR') program was established at the same time as the Capacity Building program, in 2001-02. Both are initiatives funded by the Commonwealth Government through a four-year, \$86 million package committed to the native title system in the 2001-02 Budget. The objective of the SPCR program is to resource nationally important native title applications that are likely to be of significant value in establishing legal precedents (Attorney-General's Department, Submission to the 2004 Parliamentary Inquiry, p 7).

⁸¹ This figure has been derived by subtracting the expenditures for the SPCR program and the Capacity Building program from the total Government expenditure on NTRBs.

⁸² AT SIS, *Annual Report 2003-04*, p 60.

⁸³ *Ibid.*

⁸⁴ *Ibid.*, p 59.

⁸⁵ An amount of \$12.06 million was appropriated for third party respondents and, of this, \$9.985 million was spent. The remainder was 'rephased' (that is, the unspent \$2.075 million was incorporated into the 2004-05 budget). Figures provided by the Attorney-General's Department on 24 January and 7 April 2005.

⁸⁶ This amount is allocated to the Native Title Unit of the Commonwealth Attorney-General's Department. Figure provided by the Attorney-General's Department on 6 April 2005.

⁸⁷ B Harvey and E Fry, *What Cost Native Title?* (November 2003); Rio Tinto, Submission to the 2004 Parliamentary Inquiry, p 5.

⁸⁸ Rio Tinto, Submission to the 2004 Parliamentary Inquiry, p 5.

3.4.1 Funding to NTRBs

It has been made abundantly clear through our background research and during consultations that there is widespread concern about current funding levels to NTRBs. Each of the three ATSIAC-commissioned reviews of NTRBs over the past decade, and many other reports, have noted that NTRB funding is not commensurate to the tasks these bodies are required to perform.⁸⁹ For example, the 1999 Love-Rashid Report found that “workloads of NTRBs are significantly higher than allowed for by present funding”.⁹⁰ The authors of the report noted the 1997-98 funding for NTRBs was \$47 million and calculated that a far greater amount – \$82 million – would be needed in 1999-2000 to meet mandated functions.⁹¹ As shown above, funding to NTRBs in 2003-04 was \$53.9 million.

Furthermore, 19 of the total 30 submissions to the 2004 Parliamentary Inquiry raised concerns about NTRB funding levels,⁹² and a further ten refer to under-funding of PBCs.⁹³ In particular, the submission of the Aboriginal and Torres Strait Islander Social Justice Commissioner notes that, since the late 1990s, “the division of funding within the native title system has changed. Proportionally, NTRBs are receiving less, and the percentage of funding used by other institutions has increased”.⁹⁴ A direct result of this is that the capacity of NTRBs to “adequately promote and protect Indigenous interests in the native title process” is diminished.⁹⁵ This bears out the prediction of the 1999 Love-Rashid Report that “[i]f NTRBs are not adequately funded they will not merely ‘under perform’, they will spiral down into a cycle of immediacy: deferring strategic decisions; externalising costs; forgoing opportunities for negotiation and settlement; only dealing with that which demands attention at any given moment; and take on roles which deliver achievements as best they can”.⁹⁶ There have also been concerns expressed about the funding process, with several NTRBs describing it as a “drip feed” style of funding.

⁸⁹ 1995 Parker Report; 1999 Love-Rashid Report; 2002 Miller Report; P Wand and C Athanasiou, *Review of the Native Title Claim Process in Western Australia, Report to the Government of Western Australia*, Western Australia (September 2001); 2004 Thurtell Report, p 113. See also Tribunal, Submission to the 2004 Parliamentary Inquiry, para 35, which flags the need for the Commonwealth Government to examine the level of resources available for NTRBs to ensure an “appropriate relativity of resources between the various institutions within the native title system”.

⁹⁰ 1999 Love-Rashid Report, p 1.

⁹¹ 1999 Love-Rashid Report, p 71.

⁹² See submissions from the following organisations and individuals: Aboriginal and Torres Strait Islander Social Justice Commissioner, pp 1, 4-11 and 16; ALRM Native Title Unit, pp 2, 4 and 5-6; ATSIAC, p 13; Goldfields, pp 6-8 and 10; Indigenous Land Corporation, p 3; John Basten QC, pp 5-6; Minerals Council of Australia, pp 1-3; Ngaanyatjarra, pp 1, 3 and 4; NSW Farmers Association, pp 2 and 3-4; NSW Government, pp 1-2; NSW NTS, pp 3, 8 and 15-20; NTS Victoria, p 5; Office of Native Title, Western Australia, pp 2-4; Queensland Indigenous Working Group, pp 4 and 14-19; Rio Tinto, pp 3, 7, 9-10, 12 and 13; Tribunal, pp 2, 4 and 5-6; TSRA, pp 2 and 5; Western Australia Local Government Association, p 1; Yamatji, pp 3, 4, 5-6, 17 and 19-26.

⁹³ See submissions from the following organisations and individuals: Australian Minerals and Energy Council, p 3; Goldfields, pp 5-6; John Basten QC, p 3; Ngaanyatjarra, p 4; Northern Territory Government, p 5; NSW NTS, p 26; Office of Native Title, Western Australia, p 5; Rio Tinto, p 10; Tribunal, pp 4 and 6; TSRA, pp 2, 5 and 9.

⁹⁴ Aboriginal and Torres Strait Islander Social Justice Commissioner, Submission to the 2004 Parliamentary Inquiry, p 6.

⁹⁵ Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2001*, HREOC, Sydney, p 55.

⁹⁶ 1999 Love-Rashid Report, p 3.

Highlighting the diminished capacity to which the Social Justice Commissioner referred, Justice Merkel commented, in June 2001, during the hearing of a final application by the KLC to defer the *Rubibi* matter, “It’s very hard for me to accept that on the one hand the Commonwealth are funding the Court to hear native title cases, on the other hand chopping off the funds to parties who are prosecuting them...”.⁹⁷

Moreover, the effective functioning of NTRBs directly influences the rate and success of native title agreement making. Thus, a by-product of under-funded NTRBs is that industry and Indigenous development initiatives are hampered. This has been recognised, for example, by the mining industry.⁹⁸ Proper resourcing of NTRBs is, therefore, critical to advance industry, corporate and Indigenous economic objectives.⁹⁹ As was noted in the 1995 Parker Report, the economic arguments for adequately resourcing NTRBs are as strong as the rights-based arguments.¹⁰⁰

3.4.2 Comparison of funding – NTRB and non-government respondent parties

A comparison of the level of funding granted to non-government respondent parties with the funds allocated to the legal functions of NTRBs indicates the need for consideration of the appropriateness of current allocations.¹⁰¹

The Commonwealth Government allocated \$12.1 million to non-government respondent parties in 2003-04, of which just under \$10 million was utilised, to assist them in defending claims and progressing agreement making.¹⁰² It should be noted that this figure does not include additional private expenditure by respondent parties. In 2004, NTRBs spent

⁹⁷ Transcript of Proceedings, *Rubibi Community v The State of Western Australia* (Federal Court of Australia, Merkel J, 1 June 2001).

⁹⁸ See: House of Representatives Standing Committee on Industry and Resources, *Exploring: Australia’s Future – impediments to increasing investment in minerals and petroleum exploration in Australia*, Canberra (21 August 2003) (‘Prosser Inquiry Report’); and M Priest, ‘Miners Call for More Native Title Funding’ (14 February 2005) *Australian Financial Review* p 3.

⁹⁹ The President of the Tribunal, Graeme Neate, has noted that the level of NTRB resources directly affects their ability to negotiate quality agreements (Tribunal, ‘The President’s Overview’, *Annual Report 2003-04*, p 21). Also see: Tribunal, Submission to the 2004 Parliamentary Inquiry, p 4. The Report of the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Land Fund into Indigenous Land Use Agreements also noted the inability of many NTRBs to fully engage in the agreement making process due to insufficient resources (Joint Parliamentary Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, *Second Interim Report for the s.206(d) Inquiry into Indigenous Land Use Agreements* (September 2001) pp 37-38). Also see Chapter 6 of that report.

¹⁰⁰ The 1995 Parker Report states: “As compelling as arguments based on social justice, human rights and a ‘fair go’ may be, we believe that there are several strong arguments based on economic good sense for ensuring that Native Title Representative Bodies are adequately resourced and function efficiently” (1995 Parker Report, p xi).

¹⁰¹ As the Aboriginal and Torres Strait Islander Social Justice Commissioner has noted, “[t]he percentage of total funding provided to respondents to native title claims has increased over time”, thus, “questions need to be asked whether this magnitude of increase is warranted, particularly given the protection of respondent interests in the native title system” (Aboriginal and Torres Strait Islander Social Justice Commissioner, Submission to the 2004 Parliamentary Inquiry, p 6). See also N Pearson, *Where we’ve come from and where we’re at with the opportunity that is Koiki Mabo’s legacy to Australia*, paper delivered at the Native Title Conference, Alice Springs (3 June 2003), www.capeyorkpartnerships.com/noelpearson/pdf/np-mabo-lecture-3-6-03.pdf at 1 April 2005 (‘2003 Mabo Lecture’).

¹⁰² Although a definitive breakdown is not available, a number of diverse stakeholders have advised that the vast majority of this amount is spent on the legal costs associated with native title matters. Figure provided by the Attorney-General’s Department on 7 April 2005.

approximately \$12.9 million on wages for in-house lawyers and fees for external legal consultants.¹⁰³

NTRBs perform the bulk of the work in progressing claims and preparing negotiations – respondent parties do not carry out any initial preparatory work and, for the most part, only respond to claimants’ materials. Moreover, NTRBs must manage the information requests and timelines of respondent parties, as well as respond to future act notices and perform their accountability functions (for further explanation see Section 3.2 above).

Given this background, a comparison of the \$12.9 million available to NTRBs to spend on native title related legal costs, with the \$10 million spent by non-government respondent parties, is warranted; however, it is acknowledged that the numbers are merely indicative and not directly comparable. If \$10 million is required by respondents to participate in claims and negotiations, the question arises as to whether \$12.9 million is a sufficient amount for NTRBs to cover the costs of performing their legal functions.¹⁰⁴

3.5 Achievements in the last decade and 2004 in particular

Despite their constraints, NTRBs are continuing to achieve tangible outcomes for their clients. Between the commencement of the *Native Title Act* and the end of 2004, 64 determinations of native title had been made, relating to more than 453,000 sq km of land and to some sea areas (see map in Appendix 5).¹⁰⁵ Of the 64 determinations, 45 found that native title exists.¹⁰⁶ In addition, 2,608 future act applications have been resolved¹⁰⁷

¹⁰³ The figure of \$12.9 million is an estimate of the total expenditure by NTRBs on (i) external legal counsel (\$8.0 million), and (ii) salaries plus superannuation for in-house legal staff (\$4.9 million).

The figure of \$8.0 million for external legal counsel was calculated on the basis of:

- figures for 15 NTRBs provided through personal communication or 2003-04 annual reports, and
- extrapolations from the costs for those 15 NTRBs to the remaining two NTRBs.

The figure of \$4.9 million for in-house legal staff was calculated on the basis of:

- figures provided by 15 NTRBs through personal communication or 2003-04 annual reports, and
- an approximation of \$73,000 per lawyer for the remaining two NTRBs (based on the weighted average for the other 15 NTRBs).

¹⁰⁴ It is worth noting the concern raised by several interviewees highlighting the disparity in the kind of legal advice obtained by claimants as opposed to non-government respondent parties. Non-government respondent parties routinely engage top-tier private firms to represent them. Claimants, on the other hand, largely rely on NTRBs which generally do not have the funds to augment their legal capacity by briefing work to top-tier legal firms except in dire circumstances. Thus interviewees described routine directions hearings, where non-government respondent parties had instructed attendance by one (or more) lawyers from top-tier commercial firms while representation of claimants was limited to a single employed lawyer from an NTRB.

¹⁰⁵ Figures provided by the Tribunal on 19 January 2005. This includes both registered and conditional determinations. A native title determination is the “legal recognition of the rights and interests held by Indigenous Australians according to traditional laws and customs” (Tribunal, www.nntt.gov.au/applications/apps_landing.html at 3 February 2005). The map provided in Appendix 5 is available at http://www.nntt.gov.au/publications/data/files/National_FC_NTDA_Schedule.pdf at 1 April 2005).

¹⁰⁶ Of the 45 determinations, 31 were consent determinations, 14 were litigated and 11 were unopposed (figures provided by the Tribunal on 20 January 2005). For the year 2004 see: *Alyawarr, Kaytetye, Warumungu, Wakay Native Title Claim Group v Northern Territory of Australia* (2004) 207 ALR 539; [2004] FCA 472; *Lardil Peoples v State of Queensland* [2004] FCA 298; *Neowarra v State of Western Australia* [2004] FCA 1092; *Gale on behalf of the Darug People v Minister for Lands* (Unreported, FCA, 7 September 2004, Madgwick J); and *Lawson v Minister for Land & Water Conservation* [2004] FCA 165.

¹⁰⁷ Tribunal, www.nntt.gov.au/futureact/Applications.html at 24 January 2005.

and 143 ILUAs have been registered.¹⁰⁸ Numerous other agreements not required to be registered under the *Native Title Act* have also been negotiated.¹⁰⁹

In particular, the past year saw:

- 13 positive determinations¹¹⁰ (two in Western Australia and 11 in Queensland), representing almost 30% of the total number of positive determinations made since the commencement of the *Native Title Act*, and nearly a quarter of the total number of determinations made thus far¹¹¹
- the registration of 33 ILUAs (21 in Queensland, eight in the Northern Territory, two in South Australia, and one in each of Western Australia and Victoria)¹¹²
- the finalisation of at least 13 non-ILUA agreements (in the Northern Territory, Western Australia and Queensland)¹¹³
- agreement in respect of the country's largest native title settlement, covering 188,000 sq km of Western Australia's central desert region¹¹⁴
- signing of the first native title agreement in South Australia. The State-wide agreement, signed on 3 December 2004 after 20 months of negotiations, by four local councils, the Narungga people and the State Government, determines a protocol for planning and infrastructure in the area subject to the agreement¹¹⁵
- the finalisation of pro forma ILUAs for exploration and mining licences in Victoria, and
- the substantial resolution of the long-standing public works issue in the Torres Strait.¹¹⁶

A more detailed list of achievements in each State is provided in Appendix 6.

¹⁰⁸ Tribunal, www.nntt.gov.au/ilua/browse_ilua.html at 24 January 2005.

¹⁰⁹ See, for example, the Agreements, Treaties and Negotiated Settlements database at www.atns.net.au at 1 April 2005.

¹¹⁰ There were 15 determinations in total made in 2004, two of which were negative. The two negative determinations relate to an area of 147 sq km (figures provided by the Tribunal on 19 January 2005).

¹¹¹ These 13 determinations relate to areas covering 91,628 sq km, which is more than 20% of the total area that has been determined since the commencement of the Act. Figures provided by the Tribunal on 18 January 2005. The figures from which conclusions, in relation to area, are drawn are based on determination areas that may have an external boundary that includes areas excluded by the determination. This may result in mapping difficulties (information provided by the Tribunal on 18 January 2005).

¹¹² Tribunal, www.nntt.gov.au/ilua/bydate_index.html at 7 January 2005.

¹¹³ Tribunal, www.nntt.gov.au/media/index.html at 30 December 2004. Note that the actual figure is expected to be much higher; currently there is no system for reliably recording the number of non-ILUA agreements.

¹¹⁴ The Hon. Eric Ripper MLA, *Largest-ever native title settlement reached*, Government of Western Australia Media Statement (23 December 2004), www.mediastatements.wa.gov.au/media/media.nsf at 25 January 2005. The agreement is in respect of the Gibson Desert, Tingarri Tjina, Tjirrkarli Kanpa, Warburton-Mantamaru, Irrunytju Papulankutja, and Baker Lake claims.

¹¹⁵ Tribunal, www.nntt.gov.au/cgi-bin/print_version/print_version.pl?conf=conf.xml&file=/media/110203971_1_476.html at 7 January 2005.

¹¹⁶ It had been argued by the Queensland Government that the building of public works would extinguish native title. However, after protracted negotiations, the Queensland Government agreed to recognise exclusive native title over five islands in the Torres Strait where public works had been built. See *Mye on Behalf of the Erubam Le v State of Queensland* [2004] FCA 1573. See also: T Waia T and G Reid, "Public Works": practical implications and legal arguments about extinguishment of native title by the construction of public works on Torres Strait Islander land, paper delivered at the Native Title Conference, Alice Springs (3 June 2003); TSRA, Native Title and Public Works, www.tsra.gov.au/www/index.cfm?pageID=124 at 24 February 2005; *Erubam Le (Darnley Islanders) (No. 1) v State of Queensland* [2003] FCAFC 227.

Although not all positive determinations and agreements represent the achievement of substantive recognition or protection of rights for Indigenous Australians,¹¹⁷ the accomplishments above demonstrate the capacity of NTRBs and their staff to achieve results. Capacity building within NTRBs is critical to ensure that these sorts of outcomes can continue in a cost-effective and timely manner.

3.6 Issues for the coming decade and beyond

Although much has been achieved in the last decade, there is still a large amount of work to be done. Outstanding native title work falls into the following main areas:

- unsettled claimant applications
- legal issues in need of clarification
- future act applications
- agreement making and implementation
- management and administration of PBCs, and
- compensation claims.

3.6.1 Applications to be resolved

As at 19 January 2005, there were 641 native title applications awaiting resolution, 597 of which were claimant applications.¹¹⁸ This is ten times the number of native title determinations that have been made to date (64), and relates to ten times the geographical area covered by these determinations. That is, while the area for which native title claims have already been determined is 453,000 sq km, the extent of land covered by the active claimant applications (as at 26 February 2004) is 4,507,000 sq km.¹¹⁹ Rights existing over this area have not been resolved; until that occurs the potential of the land – whether it be for economic, social or cultural use – cannot be fully realised.

¹¹⁷ An evaluation of the extent of positive outcomes for Indigenous Australians achieved through native title determinations and the signing of agreements is beyond the scope of this Project but there has been considerable discussion on this topic. See: S Bradfield, 'Agreeing to Terms: What is a 'Comprehensive' Agreement?' (2004) 2(26) *Land, Rights, Laws: Issues in Native Title*; C O'Faircheallaigh, 'Native Title and Agreement-Making in the Mining Industry: Focusing on Outcomes for Indigenous Peoples' (2004) 2(25) *Land, Rights, Laws: Issues in Native Title*; G Neate, *Land, Law and Language: Some Issues in the Resolution of Indigenous Land Claims in Australia*, Paper delivered to the International Association of Forensic Linguists, Sydney (11 July 2003) p 77; M Langton and L Palmer, 'Modern Agreement Making and Indigenous peoples in Australia: Issues and Trends', (2003) 8(1) *Australian Indigenous Law Reporter*, p 14; P Agius, J Davies, R Howitt and L Johns, 'Negotiating Comprehensive Settlements of Native Title Issues: Building a New Scale of Justice in South Australia' (2002) 2(20) *Land, Rights, Laws: Issues of Native Title*; M Riley, "'Winning" Native Title: The Experience of the Nharnuwangga, Wajarri and Ngarla People' (2002) 2(19) *Land, Rights, Laws: Issues of Native Title*; F Flanagan, 'Pastoral Access Protocols: The Corrosion of Native Title by Contract' (2002) 2(19) *Land, Rights, Laws: Issues of Native Title*.

¹¹⁸ Figures provided by the Tribunal on 19 January 2005. This figure includes claimant, non-claimant and compensation applications. A native title application is an application made for a determination of native title in a particular area of land or water. A claimant application is "an application made by indigenous people for a determination that native title exists" (Tribunal, www.nntt.gov.au/applications/apps_landing.html at 3 February 2005). The number of outstanding claims has been significantly reduced over recent years by the combination of existing claims – this has occurred in relation to approximately one-fifth of the total number of claimant applications made (figures provided by the Tribunal on 18 January 2005).

¹¹⁹ Information provided by the Tribunal on 19 January 2005. Areas seaward of the "high water mark" have not been accounted for.

It is important to note that figures for areas subject to claims are overstated to some extent. This is because the figures are based on the external boundary of each application and may include parcels of land where native title has been extinguished and, therefore, these parcels have to be excluded from the claim area. Nevertheless, the relative difference between the area over which determinations have been made and that representing outstanding applications is a good indication that there is much still to do.

On the basis of both the number of claims yet to be determined and the area affected by such claims, it appears that approximately 90% of native title work is yet to be completed. At the minimum, resolution of these claims will take at least a decade.

3.6.2 Legal issues to be settled

Recent High Court cases have resolved many broad principles and settled much law relating to the *Native Title Act* (see Section 2.1 above). Yet, there remain a number of unresolved issues, both legal and otherwise.¹²⁰ These include:

- the meaning and relevance of ‘connection’ in determining whether claimed rights and interests are ‘native title rights and interests’¹²¹
- the meaning of ‘continuity’¹²²
- the meaning and relevance of community and the issue of ‘common or group rights’
- the operation of ss.47A and 47B in relation to public works, and extinguishment on town and local government boundaries¹²³
- specific issues in relation to sea-country,¹²⁴ in particular Commonwealth waters and fishing interests as well as characterisation of native title in relation to intertidal zones and seas
- freshwater issues
- the levels of proof required in relation to ILUAs, consent determinations and contested determinations
- extinguishment on town and local government boundaries,
- issues in relation to compensation claims,¹²⁵ and
- issues specific to each State or Territory relating to the interaction of native title law (and processes) with the variety of relevant State/Territory legislation.

¹²⁰ According to Graeme Neate, President of the Tribunal, “[t]he law has only recognised native title for just over a decade. We are still working out the implications of that fundamental change to our way of thinking” (G Neate, *The ‘tidal wave of justice’ and the ‘tide of history’: ebbs and flows in Indigenous land rights in Australia*, Paper delivered at the 5th World Summit of Nobel Peace Laureates, Rome, Italy (10 November 2004) pp 28-29. See also N Pearson, 2003 Mabo Lecture, pp 8 and 12.

¹²¹ N Pearson, 2003 Mabo Lecture, p 12. This includes issues concerning the categories of people who can have connection under *Native Title Act* section 223(1)(b).

¹²² *Ibid.*

¹²³ J Basten, ‘Beyond Yorta Yorta’ (2003) 12(24) *Land, Rights, Law: Issues of Native Title*, p 7.

¹²⁴ *Ibid.*, p 8.

¹²⁵ *Ibid.*, p 8. This long-standing unresolved issue has been raised by many; see for example: D Smith, *Valuing Native Title*, Centre for Aboriginal Economic Policy Research, Australian National University, Discussion Paper No. 222 (2001), http://eprints.anu.edu.au/archive/00001036/00/2001_DP222.pdf at 1 April 2005. Note that this issue is addressed in the *Yulara* matter which has been part heard: *Jango v Northern Territory of Australia (No.2)* [2004] FCA 1004.

3.6.3 Future Acts

Under the *Native Title Act*, native title claimants have the right to negotiate over certain proposed developments and have lesser procedural rights in relation to other types of proposed development. Developments to which the right to negotiate or these procedural rights apply are termed 'future acts'. Where the right to negotiate applies, a State or Territory government cannot undertake future acts, such as the grant of a mining tenement or petroleum permit, unless the relevant provisions of the *Native Title Act* are met, and the 'right' is provided for. This right of native title claimants gives rise to a significant amount of legal advice work for NTRBs which continues even after the native title claims are determined.

Although it is difficult to accurately identify the number of outstanding future act notices at any one time,¹²⁶ we are able to conclude that associated workloads are significant. For example, NSW NTS receives over 1,500 future act notices a year and Goldfields received 820 in the 2002-03 reporting period.¹²⁷ In addition, there are approximately 5,000 mineral tenement applications yet to be released by the Western Australian Government.¹²⁸ Clearly, future act matters will continue to generate significant workloads for NTRB lawyers.¹²⁹ One aspect of this workload is a capacity building role, as much 'future act work' involves the creation of structures through which native title holders can themselves manage and exercise their title.

3.6.4 Agreements

Negotiated agreements, such as ILUAs and other negotiated forms of agreement, have come to the forefront of native title.¹³⁰ Such regional agreements often involve long-term commitments among a variety of stakeholders and require extensive preparation. Thus, negotiating and administering enduring agreements (including establishing corporations or trusts to deal with aspects of agreements and monitoring the implementation of such agreements) represents a substantial component of current and future legal work for NTRBs. Additionally, considerable work is involved in achieving the registration of ILUAs. As with future acts, capacity building is an important component of the work of NTRB lawyers in the context of agreements – that is, they play a role in building the capacity of native title claimants and holders to be able to monitor and ensure implementation of their agreements.

3.6.5 Registered Native Title Bodies Corporate and Prescribed Bodies Corporate

For each determination of native title, the *Native Title Act* mandates the establishment of a corporation whose function is to hold and manage the rights and interests held under native title on behalf of the native title holding group. These bodies are called Prescribed

¹²⁶ For example, the Tribunal records a national total of 825 future act notices outstanding (that is, where the closing date is still pending) as at 27 January 2005 (figure provided by the Tribunal, 27 January 2005). Yet, NSW NTS reports that it alone receives over 1,500 future act notices each year (NSW NTS, Submission to the 2004 Parliamentary Inquiry, p 6).

¹²⁷ NSW NTS, Submission to the 2004 Parliamentary Inquiry, p 6; Goldfields, Submission to the 2004 Parliamentary Inquiry, p 2. Note not all future act notices attract the right to negotiate.

¹²⁸ Goldfields, Submission to the 2004 Parliamentary Inquiry, p 3.

¹²⁹ Tribunal, *National Native Title Tribunal Annual Report 2003-04*, p 13.

¹³⁰ OIPC, Submission to the 2004 Parliamentary Inquiry, p 5.

Bodies Corporate ('PBCs') until they are registered on the National Native Title Register, when they become Registered Native Title Bodies Corporate ('RNTBCs'). The relationship between these bodies and NTRBs is a key issue for the effective operation of the native title system.¹³¹ Currently, NTRBs assist PBCs/RNTBCs generally until their first annual general meeting.¹³² However, as yet there is neither a structure nor funding in place for continued support. Thus, the future operation of RNTBCs remains uncertain and problematic. These difficulties are discussed further in Part E, Section 3.1.2, below.

4. Conclusion

To date, the native title system has facilitated the determination of 64 native title claims, 143 ILUAs and numerous other agreements. Although these achievements are significant, the progress of native title claim resolution through the system has been suboptimal (for a variety of reasons, not all explored in this Report). Only 10% of existing native title matters have been determined.

Government funding over the last decade totals over \$1 billion, and over \$100 million is injected annually into the native title system. It is imperative that action is taken to ensure that the native title statutory machinery is functioning effectively and is capable of dealing efficiently with the 90% of native title claims that remain in the judicial pipeline, and also with 'second generation' native title matters to come.

The Commonwealth mandated the functions of NTRBs as part of the native title machinery in the *Native Title Act*. The diverse roles played by NTRBs are central to the performance of the system as a whole, carrying out the preparatory work on 70-90% of claims. Within NTRBs, the great bulk of responsibility and workload in the preparation and running of claims and agreement making falls upon the lawyers.

This Report sets out recommendations which would better equip NTRBs and their lawyers to perform the functions prescribed by statute. Adequately supported NTRB lawyers are crucial to reduce unnecessary procedural delays in the resolution of claims and agreements and to ensure that the level of certainty required by all parties as to the status of their rights is achieved.

Our research indicates that investment in the recruitment and professional development of NTRB lawyers is urgently required. The recommendations and each of the strategies proposed in Part E below 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.

¹³¹ See: Anthropos Consulting Services, Ebsworth & Ebsworth and Senatore Brennan Rashid, *Research Project into the Issue of Funding of Registered Native Title Bodies Corporate*, Consultancy for ATSIC (2002) ('2002 ATSIC RNTBC Report'); and C Mantziaris and D Martin, *Native Title Corporations: A Legal and Anthropological Analysis* (Sydney: The Federation Press, 2000).

¹³² See n. 68 above.

PART D PROFILE OF CURRENT NTRB LAWYERS

In Part D, we provide a snapshot of the lawyers working at Representative Bodies as at 31 December 2004. This is the first time such an analysis has been carried out. It is an important first step in determining how to address the issues raised during consultations. Unless otherwise stated, the information relating to lawyers in this Part reflects those in the NTRB system as at 31 December 2004. In addition, for ease of expression, references in this part to 'States' include the Northern Territory. Some of the statistics referred to are presented in tables in this Part; otherwise, references are to tables contained in Part F.

1. Number of NTRB lawyers in the system

Of the 17 NTRBs across the country:

- seven are located in Queensland
- five are in Western Australia
- two are in the Northern Territory
- one is located in each of South Australia, New South Wales and Victoria, and
- there are no NTRBs in Tasmania or the Australian Capital Territory (see map in Appendix 7).

During the consultation period a total of 89 lawyers worked within the NTRB system in either a full-time or part-time capacity. Thirteen of these lawyers had left by 31 December 2004. Since 1 January 2005, a further 13 have left the system or have given notice.¹³³

Of the 76 lawyers working in the Representative Body system as at 31 December 2004:¹³⁴

- 40 were male, and
- 36 were female (see Table F1).

There is divergence in the number of lawyers employed per State, which reflects the number of NTRBs in each.

There is also significant divergence in the number of lawyers per NTRB. As at 31 December 2004, the largest employer of NTRB legal staff, Yamatji (with 16 lawyers), employed twice as many lawyers as the next largest Representative Body, NLC (which employed eight).¹³⁵ At the other extreme were two NTRBs in Queensland that each had only one lawyer (see Table D1).

In each State other than Queensland, the average number of lawyers in each NTRB was between five and seven lawyers. In Queensland, the average number of lawyers was

¹³³ In total, since October 2004, 20 lawyers have left the system. This represents 26% of the total number in the system as at 31 December 2004. In addition, during the same period two more lawyers left their current positions for legal positions with other NTRBs.

¹³⁴ This includes lawyers at Gurang Land Council. Although no interviews were conducted at Gurang, OIPC advised in December 2004 that Gurang employed two lawyers. Gurang annual reports indicate that these two lawyers were recruited after June 2003.

¹³⁵ It should be noted that Yamatji is the only NTRB in Australia that represents two NTRB regions and also deals with a particularly heavy future acts workload (see n. 136 below).

2.7.¹³⁶ Nationally, the average number of lawyers per NTRB was 4.5 lawyers (see Table F2).

Table D1 – Number of lawyers by NTRB, as at 31 December 2004¹³⁷

State	NTRB	No. Lawyers	Total
WA	Goldfields	3	28
	KLC	3	
	Ngaanyatjarra	3	
	SWALSC	3	
	Yamatji	16	
QLD	Carpentaria	1	19
	Central Queensland	4	
	Cape York	4	
	North Queensland	4	
	Queensland South	1	
	Torres Strait	3	
	Gurang	2	
NT	CLC	4	12
	NLC	8 ¹³⁸	
SA	ALRM	7	7
NSW	NSW NTS	5	5
VIC	NTS Victoria	5	5
TOTAL		76	76

Source: NTRB annual reports, consultations, Project Team analysis

¹³⁶ The disparity in the number of lawyers at each NTRB can be seen to roughly reflect the quantity and type of native title work arising or performed in each State. Workload comparisons can be drawn – but only loosely – based on figures such as the number of active applications and the number of future act notices received quarterly (see Table F3).

For example, Yamatji (in Western Australia) – which has the highest number of lawyers out of all NTRBs – has a very heavy future act workload, resulting from the high level of mining and exploration activity in its region: Western Australia supplies 97% of Australia's iron ore, with most of that produced in the Pilbara. Two companies (Rio Tinto and BHP Billiton) are currently implementing more than \$1 billion worth of expansion of their iron ore mining processes and infrastructure, while a new company (Fortescue Metals Group) has entered the industry in the region (Yamatji, *Annual Report 2004*, p 10). The land development potential of this region provides opportunity for alternative funding arrangements for additional legal staff. For example, under negotiation protocols signed with Rio Tinto and the Fortescue Metals Group, Yamatji has secured contributions of resources towards negotiations (Yamatji, *Annual Report 2004*, p 50).

¹³⁷ This includes full-time and part-time lawyers.

¹³⁸ Three of these are employed with funding under the *Native Title Act*, and the remaining five are funded under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth). All may perform native title-related functions to some degree, such that the total native title work performed does not exceed three positions.

2. Location

As at 31 December 2004, the 76 lawyers in the system worked out of 22 offices, with only Yamatji and NSW NTS having lawyers at more than one location¹³⁹ (see Table D2). This is a shift from the past when at least five NTRBs had lawyers located in more than one office. Thus, there has been a trend towards centralising the legal function.

In recent years, there has been a steady relocation of Representative Body legal teams to larger cities. This is driven by two main factors:

- it enables the lawyers to be near to the courts and the government officials they deal with, and
- it is easier to recruit lawyers to work in larger cities.

In Western Australia, for example, four of the five NTRBs have legal officers in Perth and the fifth has all of its lawyers in Broome. In 1999, Yamatji opened an office in Perth, in addition to its Geraldton office. Ngaanyatjarra moved its two lawyers from Alice Springs to Perth in 1999 and 2003; now all three current legal officers are located in Perth. In 2000, Goldfields also opened an office in Perth (in addition to its Kalgoorlie office) in which some of their lawyers are now based. Since 2001, when SWALSC was recognised as the NTRB for the south west region, its offices have been located in Perth. Kimberley Land Council lawyers were located in Broome, Kununurra¹⁴⁰ and Derby¹⁴¹ until late 2000 when they were centralised in Broome.

Overall, eight NTRBs now have offices and legal staff in capital cities with populations exceeding one million (one in each of Sydney, Melbourne, Adelaide and Brisbane, and four in Perth). These offices accommodate 34 lawyers, comprising 45% of the total number of lawyers in the NTRB system.

The other 14 offices (and 55% of NTRB lawyers) are in cities and towns with populations under one million at the time of the last Census (see Table D2).

¹³⁹ During 2004, Goldfields also had a lawyer located at their office in Kalgoorlie, however, that position became vacant in November 2004. Carpentaria has been looking for a lawyer for its Burketown office since May 2004.

¹⁴⁰ Kununurra had a population of 5,485 in 2001 (Australian Bureau of Statistics, Census 2001).

¹⁴¹ Derby had a population of 3,688 in 2001 (Australian Bureau of Statistics, Census 2001).

Table D2 – Number of NTRB lawyers by office location, as at 31 December 2004

State	NTRB	Offices where lawyers located	No. lawyers by office	Population as at 2001
WA	Goldfields	Perth	3	1,433,217
	KLC	Broome	3	15,906
	Ngaanyatjarra	Perth	3	1,433,217
	SWALSC	Perth	3	1,433,217
	Yamatji	Perth	8	1,433,217
	Yamatji	Geraldton	4	29,996
	Yamatji	Port Hedland	2	13,820
	Yamatji	Karratha	2	11,325
Western Australia Total			28	
Qld	Carpentaria	Mount Isa	1	20,000
	Central Queensland	Mackay	4	75,020
	Cape York	Cairns	4	133,199
	Gurang	Bundaberg	2	55,998
	North Queensland	Cairns	4	133,199
	Queensland South	Brisbane	1	1,700,000
	Torres Strait	Thursday Island	3	8,500
Queensland Total			19	
NT	CLC	Alice Springs	4	28,178
	NLC	Darwin	8	109,419
Northern Territory Total			12	
SA	ALRM	Adelaide	7	1,072,585
South Australia Total			7	
NSW	NSW NTS	Sydney	3	3,879,400
	NSW NTS	Coffs Harbour	1	48,047
	NSW NTS	Dubbo	1	38,062
New South Wales Total			5	
Vic	NTS Victoria	Melbourne	5	3,366,542
Victoria Total			5	
National Total			76	

Source: Australian Bureau of Statistics, Census 2001, NTRB annual reports, consultations, Project Team analysis

3. Indigenous lawyers

There were five lawyers of Aboriginal and/or Torres Strait Islander descent employed within the Representative Body system as at 31 December 2004 – two at ALRM, one at each of Torres Strait Regional Authority, NTS Victoria and the NSW NTS office in Dubbo (see Table F1).¹⁴² This is a proportion of around 7% of the NTRB lawyers nationwide. This exceeds the proportion of people of Aboriginal and/or Torres Strait Islander descent in the general population, which is around 2.2%,¹⁴³ but is substantially less than the

¹⁴² In addition, one lawyer of Aboriginal and/or Torres Strait Islander descent left the system during the consultation period.

¹⁴³ Australian Bureau of Statistics, Census 2001.

proportion of Indigenous NTRB chief executives¹⁴⁴ and non-legal staff, which are both over 55%.¹⁴⁵ There were no Indigenous principal legal officers in the Representative Body system. For further discussion on this, see Part E, Section 2.3.

4. Age

As at 31 December 2004, the ages of NTRB lawyers ranged from 24 to 64 years, with the average age being just under 38. As shown in Table D3, the average age varied little by State, ranging from an average of just under 36 years for lawyers in Western Australia to 39 years in Victoria and New South Wales.

Table D3 – Average age of NTRB lawyers by State, as at 31 December 2004

State	Average Age
Victoria	39.2
New South Wales	39.0
Queensland	38.9
Northern Territory	38.8
South Australia	37.3
Western Australia	35.7
National Total	37.5

Source: NTRB annual reports, consultations, Project Team analysis

On a national basis, it is interesting to note the relative maturity of lawyers working within the system, notwithstanding the high turnover levels:

- 16% were in their twenties
- 45% were in their thirties
- 30% were in their forties, and
- 9% were fifty or over.

This varies from State to State as shown below in Table D4 (for a more detailed break down, see Table F4).

¹⁴⁴ NTRB chief executive officers, executive directors and executive officers are referred to collectively as 'NTRB chief executives' throughout this Report.

¹⁴⁵ As at 31 December 2004, twelve of the 17 NTRB chief executives (71%) were Indigenous. On the basis of figures published in the 2003-04 annual reports of 11 NTRBs, it appears that 57% of non-legal staff at NTRBs were Indigenous (ALRM, p 26; Cape York, p 26; Carpentaria, p 23; Central Queensland, p 37; CLC, p 54; Gurang, p 45; KLC, p 43; NTS Victoria, p 8; Queensland South, p 40; SWALSC, p 17; Yamatji, p 20).

Table D4 – State-wide breakdown of NTRB lawyers by age, as at 31 December 2004

State	Lawyers aged 20-29	Lawyers aged 30-39	Lawyers aged 40-49	Lawyers aged 50+
Western Australia	22%	46%	28%	4%
Queensland ¹⁴⁶	12%	41%	35%	12%
Northern Territory	0%	58%	17%	8%
South Australia	43%	14%	29%	14%
New South Wales	20%	40%	20%	20%
Victoria	0%	60%	0%	40%
National Total	16%	45%	30%	9%

Source: NTRB annual reports, consultations, Project Team analysis

Females in the system were generally younger than males, with the average age for male lawyers being 40, while the average age for female lawyers was six years younger, at 34 years of age.

5. Legal education

In order to develop recruitment strategies, it is useful to understand where lawyers have been educated and where they are now working in the NTRB system (as at 31 December 2004). First, we look at where NTRB lawyers were educated. In Section 6 below, we consider where they are currently working.

Just under 60% of the nation's law graduates studied in New South Wales or Victoria. A lesser but sizeable percentage of NTRB lawyers (44%) graduated in those States. Table D5 compares the proportion of law graduates supplied by each State with the proportion of NTRB lawyers who studied in those States.¹⁴⁷ A breakdown of tertiary institutions where NTRB lawyers undertook their legal studies is in Table F5.

Of particular interest is a comparison of Western Australia and Queensland. Western Australian tertiary institutions supply only 7% of the nation's law graduates, yet 25% of the lawyers in the system were educated in Western Australia. The reverse is true in Queensland which, at 31 December 2004, had the second highest number of NTRB legal positions of any State (19). Tertiary institutions in Queensland provide 17% of law graduates, and yet only 5% of NTRB lawyers were educated in Queensland.¹⁴⁸

The success in Western Australia to some extent may be attributable to the high number of Representative Bodies and NTRB legal positions in that State relative to other States (28 of 76 positions). This may also be attributable to recruitment strategies in place in Perth – see Part E, Section 2.2.1. The disparity between Western Australia and Queensland indicates the need for particular recruitment strategies in Queensland.

¹⁴⁶ This does not include data for Gurang Land Council.

¹⁴⁷ Graduation statistics for 2003 were compiled on the basis of information provided by the 28 law schools in Australia (see Appendix 9 for details).

¹⁴⁸ These figures do not include data for Gurang Land Council lawyers.

Table D5 – Comparison of source by State of Australian law graduates to State of legal training for NTRB lawyers

State	% of the nation's law graduates in 2003	% of all NTRB lawyers who studied in Australia by State where educated
New South Wales	32%	22%
Victoria	27%	22%
Queensland	17%	5%
South Australia	7%	17%
Western Australia	7%	25%
ACT	6%	3%
Tasmania	3%	3%
Northern Territory	1%	3%
National Total	100%	100%

Source: Statistical information provided by Australian law schools consultations, Project Team analysis

6. Education in relation to employment location

The mobility patterns of NTRB lawyers are also important to the development of recruitment strategies. There are two parts to this examination. First, a State-based analysis considers whether lawyers tend to work in the same or different States from those where they completed their studies. Secondly, a city-based analysis considers whether they are based in large cities or smaller locations.

6.1 State-based analysis: State where employed as compared to State where studied

On a national basis about 50% of NTRB lawyers practice in the State in which they studied (see Table D6). Of the NTRB lawyers educated in Western Australia, only 17% have moved interstate for work; whereas 75% and 63% of those educated in New South Wales and Victoria, respectively, work interstate.

Table D6 – NTRB lawyers as at 31 December 2004 – Comparison of State where studied and State where working

State	No. of NTRB lawyers who studied in this State	No. of NTRB lawyers who studied in this State who now work in a different State	% of NTRB lawyers who studied in this State who now work in a different State
Western Australia	18	3	17%
New South Wales	16	12	75%
Victoria	16	10	63%
South Australia	12	5	42%
Queensland	4	1	25%
ACT and Tasmania	4	4	100%
Northern Territory	2	2	100%
Total	72¹⁴⁹	37	51%

Source: NTRB annual reports, consultations, Project Team analysis

Considered from a different angle, the Northern Territory and Queensland are the biggest importers of NTRB lawyers. Almost 40% (29) of the lawyers in the system work in the Northern Territory and Queensland, yet 26 of those 29 lawyers (90%) studied in other States (see Table D7).

Table D7 – NTRB lawyers as at 31 December 2004 – State where currently working

State	No. of NTRB lawyers who are graduates from interstate or overseas	% of NTRB lawyers who are graduates from interstate or overseas
Western Australia	13	46%
Queensland ¹⁵⁰	14	82%
Northern Territory	12	100%
South Australia	0	0%
New South Wales	1	20%
Victoria	1	20%
Total	41	55%

Source: NTRB annual reports, consultations, Project Team analysis

6.2 City-based analysis: large or small city location compared to State where studied

Table D8 below shows that three-quarters of those NTRB lawyers who are working in the same State as where they studied are located in cities with populations exceeding one million. On the other hand, most lawyers working in a different State from the State where they studied are located in cities or towns with populations under one million.

¹⁴⁹ This does not include data for Gurang Land Council; nor does it include two lawyers educated in South Africa.

¹⁵⁰ This does not include data for Gurang Land Council lawyers.

Of the 34 Representative Body lawyers who work in a city with a population exceeding one million, 76% are graduates from those cities. By contrast, of the 40 Representative Body lawyers working in cities and towns with populations under one million, 33 (83%) come from interstate. Further, of those 33 lawyers, 58% received their legal training in New South Wales or Victoria.

These figures illustrate that smaller, regional communities tend to draw on lawyers educated interstate. This is important to take into account when developing recruitment strategies, as recruiting interstate poses more difficulties than recruiting locally. Thus, one response to the present situation would be to focus on strategies that increase local recruitment. In addition, there is a need to provide NTRBs in these regions with the means to recruit interstate.

Table D8 – NTRB lawyers as at 31 December 2004 – Comparison of State where studied with size of city where working

State	Work in city of > 1 million	Studied in the same State	Work in city of < 1 million	Studied in a different State
Western Australia	17	65%	11	67%
Queensland ¹⁵¹	2	50%	15	87%
Northern Territory	0	n/a	12	100%
South Australia	7	100%	0	n/a
New South Wales	3	100%	2	50%
Victoria	5	80%	0	n/a
National total	34	76%	40	83%
% of national total	45%		55%	

Source: Australian Bureau of Statistics, NTRB annual reports, consultations, Project Team analysis

7. Length of experience

Given that over three-quarters of NTRB lawyers believe that lack of experience is an impediment to effective representation of clients (see Table F6), it is instructive to examine the actual levels of experience held by lawyers in the system. In addition to experience within the NTRB system, commercial law experience and experience in native title or Aboriginal land rights are considered to be relevant in terms of the skills required by Representative Body lawyers.

7.1 Experience in the NTRB system

As at 31 December 2004, the national average for the length of time that current NTRB lawyers had been practising in the system was 3.6 years. In addition:

- the average length of experience varied considerably from State to State, from a low of 2.4 years in New South Wales to a high of 5.8 years in the Northern Territory
- 16 NTRB lawyers, or around 20%, had worked at more than one NTRB, and

¹⁵¹ This does not include data for Gurang Land Council lawyers.

- nationally, the average length of time that lawyers had been working at their *current* NTRB is 2.8 years.

Table D9 provides a State-by-State breakdown of Representative Body lawyers on the basis of their time employed in the system. The table shows that, nationally:

- 23% joined the system for the first time in 2004
- 38% have been in the system for two years or less
- over half have been in the system for less than three years
- 13 NTRB lawyers (18%) have more than six years experience in the system, and
- eight of the 17 Representative Bodies have no lawyers with greater than six years experience.¹⁵²

Table D9 – Number of NTRB lawyers by length of experience, as at 31 December 2004

State	Length in NTRB system					No. of NTRBs where no lawyers with more than 6 years
	Less than one year ¹⁵³	1-2 years ¹⁵⁴	2-3 years	3-6 years	More than 6 years	
Western Australia	6	6	4	11	1	4
% of total NTRB lawyers in WA	21%	21%	14%	40%	4%	
Queensland	5	2	2	3	5	3
% of total NTRB lawyers in Qld	29%	12%	12%	18%	29%	
Northern Territory	2	1	0	5	4	0
% of total NTRB lawyers in NT	17%	8%	0%	42%	33%	
South Australia	2	1	3	0	1	0
% of total NTRB lawyers in SA	29%	14%	43%	0%	14%	
New South Wales	1	1	1	2	0	1
% of total NTRB lawyers in NSW	20%	20%	20%	40%	0%	
Victoria	1	0	0	2	2	0
% of total NTRB lawyers in Vic.	20%	0%	0%	40%	40%	
National Total	17	11	10	23	13	8
% of national total	23%	15%	14%	31%	18%	11%

¹⁵² These statistics are similar to equivalent figures for anthropologists, with a recent study finding that relatively few NTRB anthropologists (less than 30%) had more than five years experience in native title work, and one-quarter had less than one years experience (2004 Anthropos Report, p 1).

¹⁵³ That is, they were new to the NTRB system in 2004.

¹⁵⁴ That is, they were new to the NTRB system in 2003.

Source: Consultations, Project Team analysis

The profile of new NTRB lawyers – those who joined the system in 2004 or 2003 – is largely consistent with the general profile of NTRB lawyers presented in the preceding and subsequent sections of Part D. Table F7 contains relevant data on age, educational background, location and length of experience of the new lawyers.¹⁵⁵

7.2 Commercial law experience

Over half (42) of lawyers working in the NTRB system as at 31 December 2004 had prior experience in commercial legal practice. For these lawyers:

- the average length of commercial practice was 6.5 years
- over 50% had between one and two years of commercial experience, and
- eleven (mostly from Western Australia and Queensland) had over ten years experience.

Including those without any commercial experience:

- the national average for the length of commercial experience held by NTRB lawyers was 3.3 years, and
- the State averages ranged from 1.2 years in the Northern Territory to 6.7 years in Victoria.

There was a significant difference in the average commercial law experience between the genders:

- males had an average of 5.3 years experience, and
- females had an average of 1.2 years experience, four years less than males (see Table F8).

7.3 Other native title (non-NTRB) and Aboriginal land rights experience

Although many NTRB lawyers do not have prior experience working at a different NTRB, a significant number (14) have come from other relevant backgrounds, such as working in a commercial legal practice as a lawyer representing parties in native title matters or as a lawyer at an organisation administering Aboriginal land rights legislation. Seven lawyers had come from a commercial legal practice where they were advising clients in native title matters; three were advising governments involved in native title matters; two worked previously at Aboriginal land councils as lawyers advising on land rights claims; and the remaining two were involved in providing legal advice to native title claimants in other capacities (see Table F9).

A significant proportion of NTRB lawyers also have experience in the public service. Almost 30% of new NTRB lawyers (those entering the system in 2003 or 2004) have come from a public service background (see Table F10).

¹⁵⁵ Whilst the relatively older workforce of native title anthropologists has been seen as a “serious threat to anthropological involvement in native title work” (2004 Anthropos Report, p 1), this is not likely to be paralleled in respect of native title lawyers. However, in the context of NTRB lawyers, low retention rates will cause difficulties if not addressed.

8. Conclusion

The information presented in this Part profiles current NTRB lawyers and highlights, in particular, issues relating to the recruitment and retention of legal staff. The relative maturity of most NTRB lawyers is noted, with the average age being almost 38. Despite this maturity, few NTRB lawyers (13) have more than six years experience in the system indicating a difficulty of retaining experienced NTRB lawyers. Historical turnover figures are not available, however, it is noted that in the six months between 1 October 2004 and 31 March 2005, around one in four lawyers left the system.

Other key findings indicate that, in contrast to the assumptions that many observers of the system had about the gender and place of work of NTRB lawyers:

- there is an almost equal split between male and females working in the system, and
- NTRB lawyers are almost evenly divided between those who work in cities with populations exceeding one million (45%) and those in cities or towns with populations under one million (55%).

The data presented in this Part, together with feedback from the consultation process, provides the basis for the development of the strategies presented in Part E of the Report.

PART E ANALYSIS AND STRATEGIES FOR NTRB LAWYERS

1. Overview

Other reports have highlighted the need for professional support of NTRBs.¹⁵⁶ This Report details specific needs in relation to such support on the basis of findings from the consultation process, and identifies a range of alternative and complementary strategies to address them.

Two critical stumbling blocks hinder the working of NTRBs – difficulties in the recruitment of in-house lawyers and difficulties in the retention of those lawyers. The findings show that NTRBs need proactive recruitment strategies, additional expertise and experience within the NTRB system and better communication among NTRB legal staff.

We make two main recommendations in this Report:

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.

Recommendation 2: Steps should be taken to increase 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.

The strategies presented in relation to these recommendations may not be suitable for every NTRB, due to their different needs, arising from their differing histories, structures, roles and sizes. Further, not all strategies will be of direct relevance or value to all NTRB lawyers, as their level of expertise and experience vary.

1.1 Recruitment: recommendations for promoting careers in the NTRB system

Section 2 of this Part explores recruitment challenges and presents four strategies for encouraging lawyers to work in the field:

- Strategy 1 Introducing an NTRB student placement program
- Strategy 2 Focusing on career promotion to practising lawyers
- Strategy 3 Engaging a dedicated and independent NTRB human resources manager
- Strategy 4 Expanding the pool of outside counsel involved in native title matters

1.2 Retention: recommendations for supporting lawyers in the NTRB system

Section 3 of this Part addresses the professional development and support needs of NTRB lawyers. Addressing these needs is an important step towards increasing the work

¹⁵⁶ These are discussed in Part C, Section 2.2.

satisfaction for NTRB lawyers and improving their work environment, thereby improving the efficiency and retention of lawyers within the NTRB system. Section 3, includes a wide variety of strategies for professional development and enhancing NTRB legal practice. These are:

Professional development opportunities

- Strategy 5 Developing an induction manual and induction training for new NTRB lawyers
- Strategy 6 Establishing an ongoing training program for NTRB lawyers
- Strategy 7 Offering scholarships for further study
- Strategy 8 Arranging secondments to commercial law firms
- Strategy 9 Providing management training for NTRB lawyers
- Strategy 10 Implementing performance evaluation systems
- Strategy 11 Facilitating greater NTRB input into the native title conference program

Improvements to support structures

- Strategy 12 Establishing a dedicated NTRB information service
- Strategy 13 Building relationships with law firms
- Strategy 14 Creating an NTRB mentor and alumni network
- Strategy 15 Providing training opportunities for NTRB non-legal managers
- Strategy 16 Providing professional development opportunities for NTRB field officers
- Strategy 17 Forming a professional association for native title lawyers

1.3 Notes on strategies

Although the topics in this Report are arranged in distinct sections, inevitably there is some overlap. While many of the strategies address more than one challenge or area of need, we have sought to avoid repetition and have not necessarily indicated every cross reference. It should also be noted that the strategies are ordered thematically and not on the basis of importance or priority.

For each strategy, some discussion on implementation is included. This Report identifies key issues relevant to their effective implementation but does not include an exhaustive breakdown of tasks and costs. Moreover, we express no view on which government agencies should implement the suggested strategies. Ideally, each NTRB would be adequately resourced to pursue appropriate approaches and strategies themselves. This would ensure that local and regional differences are properly accommodated. However, cost-efficiency imperatives demand a degree of centralisation for the delivery of some strategies. Involvement of individual NTRBs will still be fundamental to their success and sufficient resources would need to be provided to achieve this. The strategies, having developed from feedback arising out of the consultation process, can only be effectively implemented in collaboration with NTRBs. Indeed, we only propose strategies that have received significant support from NTRBs.

Finally, it should be noted that the strategies presented in this Report are designed to be delivered to lawyers involved in representing Indigenous clients in native title-related matters. Regardless of the structure of the system within which such lawyers may operate in the future, these strategies will still be applicable.

1.4 Notes on figures

As noted in the methodology section in Part B above, 211 people were interviewed as part of the consultation process for this Project. However, not all responded to every question or commented on every topic. Accordingly, the figures cited in this Part represent the proportion of people of a particular view out of the number who *responded* to the relevant question or topic, rather than out of the total number interviewed. The tables referred to in this Part show the actual number of respondents of each view and the total number of respondents for each question or topic.

As in Part D, some of the statistics referred to in this Part are presented in charts within the corresponding sections; otherwise, table references are to charts contained in Part F.

1.5 Conclusions

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. A formalised system for sharing knowledge and accessing expertise is needed to avoid the duplication of work, inconsistency in approach and costly delays that often result under current methods of operation. Further detail on our conclusions is contained in Section 4 of this Part.

2. Recruitment

2.1 Overview

Recruitment issues facing the NTRB system fall into three broad categories – recruitment of in-house lawyers, engagement of external counsel and recruitment of Indigenous lawyers. Although the issues overlap to some extent, each has features requiring a separate response. We consider each of the three categories in the following sections.

2.2 Recruitment of NTRB lawyers

It is apparent that NTRBs face serious difficulties in recruiting both new and experienced lawyers. Of the NTRB lawyers interviewed (including eight principal legal officers), 92% commented on the difficulty of recruitment (see Table F11). Further, of NTRB chief executives, 75% commented on difficulties in recruitment (see Table F11).¹⁵⁷

Turnover in NTRBs is high – in the last six months alone (since October 2004) around one in four NTRB lawyers left their positions. In spite of this, little proactive recruitment occurs in the NTRB system. The primary recruitment strategy that exists is generally reactive: vacant position advertisements are placed in newspapers after NTRB legal staff have given notice. The result is a hiatus period for the NTRB whilst the position is vacant. Moreover, when applications are received they are few in number. The NTRB system needs proactive recruitment strategies, such as those implemented by private law firms and other organisations, to address these problems.¹⁵⁸

The number of qualified applicants is usually very small¹⁵⁹ and often, the only qualified applicants are lawyers coming from other NTRBs. Recruitment of high quality staff is largely a matter of good fortune, dependent on motivated and talented applicants to 'self-select'. Often the qualified applicants are lawyers coming from other NTRBs, and their successful application simply shifts the problem from one NTRB to another. The current practice is not a viable long-term solution. Indeed, in a small workforce typical of NTRBs there is no room for error in terms of staff choice. Strategies are needed to increase the size of the pool of interested applicants.

Carpentaria Land Council provides a useful example of the difficulties NTRBs have in recruiting lawyers. As at December 2004, there were three vacant positions at Carpentaria – two had been unfilled since May 2004 (one to be based in Mt Isa and the other in Burketown) and the third since October 2004. Very few suitable applications were received. One of the only suitable applicants lived in Fiji and was unable to obtain a visa to come to Australia. The NTRB spent over \$20,000 on advertising in local and national papers without success.¹⁶⁰

¹⁵⁷ Of these, 60% said it was difficult to recruit and a further 15% said it was sometimes difficult. Of the other respondents who commented on recruitment, an overwhelming majority (89%) also believed that it was difficult to recruit lawyers to NTRBs (see Table F11).

¹⁵⁸ The Project Team has been advised that on average in medium-to-large sized law firms, around \$2,000-2,500 is spent per lawyer on human resources functions dealing with recruitment and retention strategies.

¹⁵⁹ Interview responses indicated that no more than nine applications were received in relation to vacant positions.

¹⁶⁰ Carpentaria, personal communication, 14 December 2004.

The Kimberley Land Council in Broome has had similar difficulties over the years attracting legal staff. In 2002-03, the organisation spent eight months looking for a principal legal officer.

In May 2004, the Torres Strait Regional Authority wrote that “[a]s a result of difficulties in recruiting and retaining professional staff, the Native Title Office has not operated at full capacity for some time”.¹⁶¹

It is not coincidental that all three of these NTRBs are located in towns with populations of less than 25,000. Other than the eight offices in the major cities with over one million inhabitants (in Sydney, Melbourne, Brisbane, Adelaide and Perth), the 14 other NTRB offices are in cities and towns with fewer than 150,000 inhabitants. Of the 76 lawyers in the system as at 31 December 2004, 55% were located in these more remote locations (see Table D2). It is in the smaller cities and towns where recruitment is a particularly serious issue.¹⁶² NTRBs in those locations have to cast a very wide net to find legal staff. Whereas offices in the major cities have been able to find staff locally, over 80% of NTRB lawyers located in the smaller cities and towns have been educated in other States (see Table D8). Of these, more than half come from Sydney or Melbourne. Queensland is perhaps most urgently in need of recruitment strategies: it employs 25% of the country’s NTRB lawyers (mostly in smaller cities and towns) but supplies only 5% of NTRB lawyers.

It should be noted that the recruitment difficulties outlined above are not specific to the NTRB system or to lawyers. For some time, NTRBs have also found it difficult to attract non-legal staff, particularly in non-metropolitan areas. Furthermore, recruitment in remote areas has been a challenge for all sectors.¹⁶³

There are financial costs attaching to vacant positions: in addition to the fees involved in advertising positions, there is the increased expenditure on external legal consultants. For example, one NTRB noted in its 2003-04 Annual Report that the difficulties in recruitment and retention of sufficiently qualified staff “means that the [NTRB] must inevitably rely quite heavily on external contractors and consultants”.¹⁶⁴ During interviews, two NTRBs indicated that they were spending approximately \$600,000 each annually on outside counsel, and both estimated that one-third of this outsourced work could have been undertaken by in-house lawyers (both NTRBs had one or two legal positions unfilled at the time). Whereas outside counsel charge between \$150 and \$300 per hour, the cost of an

¹⁶¹ Torres Strait, Submission to the 2004 Parliamentary Inquiry, p 6.

¹⁶² See concerns raised by the following NTRBs which all have offices in smaller towns: Cape York, *Annual Report 2003-04*, p 11; Carpentaria, *Annual Report 2002-03*, p 3; Central Queensland, *Annual Report 2002-03*, p 3; Gurang, *Annual Report 2002-03*, pp 7 and 49; KLC, *Annual Report 2003*, p 6; Torres Strait, Submission to the 2004 Parliamentary Inquiry, pp 3, 5 and 6; and Yamatiji, *Annual Report 2004*, p 12. Other NTRBs have also made public statements regarding recruitment difficulties. See: Goldfields, Submission to the 2004 Parliamentary Inquiry, p 8; NSW NTS, Submission to the 2004 Parliamentary Inquiry, p 20; and NTS Victoria, Submission to the 2004 Parliamentary Inquiry, pp 4-5.

¹⁶³ For example, in relation to the teaching profession, see: Department of Education, Science and Training and TQELT Teacher Supply and Demand Working Group, *Demand and Supply of Primary and Secondary School Teachers in Australia*, Ministerial Council on Education, Employment, Training and Youth Affairs (2003), www.mceetya.edu.au/public/demand.htm at 1 April 2005. In relation to health professionals, see: New South Wales Chief Health Officer, *Report of the New South Wales Chief Health Officer: Rural and remote populations: Health service use* (22 November 2004), www.health.nsw.gov.au/public-health/chorep/rurr/rur_chep_aria.htm at 1 April 2005.

¹⁶⁴ Carpentaria, *Annual Report 2003-04*, p 24.

in-house lawyer's time is estimated to be between \$50 and \$70 per hour.¹⁶⁵ Effectively then, the \$400,000 worth of work paid for by these two NTRBs could have been performed by in-house lawyers at a cost of between \$100,000 and \$140,000 (assuming that the \$400,000 worth of work involved 2000 hours of external counsel's time at a rate of \$200 per hour). Although these are only approximate figures, they illustrate the substantial savings (in this case over \$250,000) that can be achieved through timely recruitment.

In addition to the financial costs and reduced capacity generally, the consequences of recruitment delays include interruption to claims and negotiation processes and adverse effects on relationships with clients.

During interviews the following issues were raised as factors contributing to the relatively low numbers of applicants for legal positions at NTRBs:

- lack of awareness among law students of the opportunities for careers in NTRBs
- lack of awareness among practising lawyers of the opportunities for work in NTRBs
- reluctance to work in remote settings due to concerns about impact on family and social life
- concerns arising from perceptions that the work environment is politicised
- perceived low salary levels, and
- concerns regarding the perceived lack of career structure and the difficulties associated with an under-resourced working environment.

Suggested ways of addressing issues relating to recruitment include:

- promoting careers in native title and providing work experience opportunities to law students
- promoting careers in native title to practising lawyers
- providing information about salary levels, and
- hiring an independent human resources consultant to work full-time on addressing recruitment issues across the NTRB system.

¹⁶⁵ According to information provided during the consultation process, the average annual wage of an NTRB lawyer is around \$73,000 (including superannuation entitlements) and NTRB lawyers work on average 55 hours per week. On the basis of these figures, we have calculated the hourly rate of an NTRB lawyer to be \$70 for a work week of 37.5 hours or approximately \$50 for the reality of a 55-hour work week. This includes an allowance of 30% for overheads and an assumption that 70% of total hours are "chargeable" (after allowing for holidays, workshops etc.).

2.2.1 Strategy 1: Law student NTRB short-term placement program

Background

In order to increase the number of applicants for NTRB legal positions, a program is needed to draw the attention of law students to the opportunities to work in the NTRB system at some stage during their careers. Currently, there is no such program. Only 36% of NTRB lawyers indicated that they became interested in the field during their studies (see Table F12 which presents a breakdown of these responses on the basis of length of experience).¹⁶⁶ Half of those attracted to the field through university were from Western Australia. This may be due to the effect of the Yamatji student placement program on recruitment in that State, as well as the involvement of Yamatji's principal legal officer at the University of Western Australia. Yamatji appears to be the only NTRB that has a voluntary student placement program.

The Yamatji program has been running since 2000, and has grown from receiving five or six applications in 2000 to 80 in 2004.¹⁶⁷ Approximately 20 students are selected for voluntary placements during the winter and summer university breaks; they generally stay for a period of two weeks.¹⁶⁸ The Yamatji program is publicised through the University of Western Australia student careers handbook, posters on student noticeboards at various universities, the Tri-law Careers Fair (an annual legal careers event in Western Australia), university summer work hand books, the principal legal officer's teaching role at the University of Western Australia and Murdoch University and via word of mouth communication among students (and former students). Yamatji reports a number of applications from interstate students each year and, on two occasions, from law students from overseas jurisdictions.

It has become clear that many law graduates, particularly in New South Wales and Victoria (which account for just under 60% of the law graduates in Australia (see Table D5)), are unaware of the opportunities of working in native title. NTRB managers and lawyers were asked about the value of student interns as a method of addressing this lack of awareness, and the consequent recruitment difficulties. A majority indicated that students could assist in various tasks and many commented on the value of this initiative in terms of career promotion (see Table F13, Table F14).¹⁶⁹

Proposal

We recommend the establishment of a nationwide program that enables high achieving law students to undertake voluntary work experience placements at NTRBs. The successful approach taken by Yamatji in Perth should be followed in any attempt to

¹⁶⁶ The need to encourage more people to work in the native title field was also recognised in the 2004 Thurtell Report (see p 112).

¹⁶⁷ Yamatji, personal communication, 18 January 2005.

¹⁶⁸ This period is consistent with the practice of most major law firms in Western Australia.

¹⁶⁹ It should be noted that positive responses were received from a smaller proportion of NTRB principal legal officers than from legal staff generally. Although double the number of NTRB lawyers believed that student interns would be valuable as compared to the number who believed they would not be valuable, principal legal officers were almost evenly split on the issue.

expand the benefits of student interns to NTRBs to the east coast and across the country more generally.

This strategy would involve high calibre final or penultimate year law students being selected on the basis of academic, social and cultural abilities. These students would be placed at an NTRB for a four- to six-week period during the summer and winter university holidays, where they would carry out legal research and other tasks as directed by the NTRB.¹⁷⁰ Such tasks may be NTRB-specific or involve regional issues that encourage intra-NTRB cooperation.

The students would need to be comprehensively briefed to give them a full and accurate understanding of their roles and responsibilities. They would also require ongoing support in order to maximise their effectiveness and minimise the burden of supervision falling on their NTRB hosts. Weekly conference calls with the students and periodic calls with their supervisors are suggested as an integral feature of the ongoing external monitoring of the students. At the end of their placement students would be expected to promote the opportunities of working in the NTRB system through presentations about their experiences to their university peers. For example, this might be at career fairs, open days or student seminars, or by writing articles for publication in career guides and other law school publications.

This first strategy seeks to raise law students' awareness about the possibility of working in the NTRB field at some stage of their career. It is important to note we are not proposing that NTRBs actively recruit recent law graduates. During the interviews it became clear that the hectic, under-resourced NTRB environment is not the place for new lawyers to acquire basic lawyering skills such as file management and understanding legal ethics. The structures are not usually in place to provide the type of general legal grounding and apprenticeship training a young lawyer needs. Moreover, most of those in the NTRB system believe that lawyers with at least some commercial or other law experience are much more valuable than inexperienced recent graduates.

Pilot program

The feasibility of an internship program was evaluated through a pilot program organised by the Project Team over the 2004-05 university summer holiday period.¹⁷¹ The pilot program, which attracted applications from over 60 students from various east coast universities, involved 18 students being placed at nine different NTRBs.

While some NTRBs were initially cautious about the proposal, once specific features were introduced to minimise the burden of supervision¹⁷² the program was received with greater

¹⁷⁰ Only a handful of lawyers and managers specified a preferred length for internships, but the responses consistently indicated that the minimum viable period is approximately one month.

¹⁷¹ The impetus for the pilot program was a result of successful student placements organised with the support of Noel Pearson at the Cape York Institute for Policy and Leadership (CYI) over the winter university break in 2004. Although the functions and work environment of the CYI are quite different to those of NTRBs, opportunities for students to work in Indigenous policy organisations such as CYI are valuable to the NTRB system in raising awareness of issues, and opportunities for work, in native title and Indigenous communities more generally.

¹⁷² In addition to the selection process which ensured that only high quality, committed students were chosen, participating students were also comprehensively briefed by the Project Team about their roles and responsibilities and provided with continued monitoring and support throughout the placement period, to minimise the burden on their NTRB supervisors.

enthusiasm. Ultimately, feedback from both the students and the supervisors that were involved was overwhelmingly positive. Indeed, many NTRBs are eager that the program be replicated in the winter of 2005 and we are currently seeking applications from interested students.

One method used to advertise the winter placements was through our participation in a careers fair held at the Australian National University in Canberra in March 2005. A stall providing information about work opportunities at NTRBs was attended by over 50 students, many of whom had previously been unaware of the existence of NTRBs. The careers fair was successful in promoting interest in NTRB legal work among ANU students: while only 3% of applicants for the 2004-05 summer placement positions (which occurred before the ANU careers fair) were from ANU, ANU law students make up 25% of the over 60 applicants to date for the 2005 winter placement positions. This demonstrates the ease with which such a program can be implemented.

Appendix 8 provides further detail and feedback on the pilot program.

Publicity

The strategies employed by Yamatji to publicise its own student placement program are instructive for considering how a national placement program could be promoted. Each of these avenues is equally applicable across universities nationally. In addition to these types of strategies, providing information to each university's law faculty student internships coordinator and marketing personnel would be worthwhile.

Future direction

The program could be expanded in the future to incorporate annual, seasonal or ongoing placements, whereby students return to the same NTRB during their legal studies. This would be beneficial in increasing students' understanding of the NTRB environment, roles and functions. It would also provide the benefit of continuity which maximises the work value of the students to NTRBs. A useful model for comparison is the John Flynn Scholarships Scheme, which funds medical students to work in rural medical practices for a minimum of two weeks a year for four years in the same rural community.¹⁷³

Implementation

Establishing and coordinating the proposed program would involve the following:

- assessing the outcomes of the pilot program (through communicating with participating NTRBs and students)
- liaising with NTRBs regarding needs in relation to tasks, timing and numbers
- publicising and promoting the program (including through attending university career fairs)
- interviewing prospective students for future placements
- briefing selected students in preparation for placements

¹⁷³ The scheme was established in 1997 with funding from the Commonwealth Government. In 1997, it was estimated that the investment by the Department of Health into the scheme amounted to approximately \$1.5 million (S Tow, *John Flynn scholarships boost health services for rural Australia*, Commonwealth Government's Department of Health and Ageing, Media Release (14 April 1997), www.health.gov.au/internet/wcms/publishing.nsf/Content/health-archive-mediarel-1997-mw29a97.htm at 1 April 2005.

- supervising and supporting students during their placements
- communicating with participating students post-placement, and
- facilitating post-placement feedback and promotion.

An independent human resources professional dedicated to assisting NTRBs with recruitment (see Strategy 3) ideally would perform these tasks as part of their broader duties. Alternatively, a consultant and administrative support would be required.

2.2.2 Strategy 2: NTRB career promotion to practising lawyers

As with the majority of law students, only a small number of practising lawyers are aware of opportunities for legal work and careers in the native title field, and more specifically, the NTRB system. Practising lawyers are potential NTRB applicants and the possibilities for challenging and rewarding work in the NTRB system should be publicised to them. This is particularly relevant in the current climate of high attrition rates from private law firms: there is a significant pool of lawyers, many of whom are at the 3-5 year level, leaving the law to pursue different careers.¹⁷⁴ Given that the salary differential is not prohibitive for lawyers at this level (see Table E1 below) and that interviewees were almost unanimous in their views that having commercial law experience is preferable for new NTRB lawyers,¹⁷⁵ this pool of experienced, practising lawyers represents an important source of potential recruits (see Tables F15 and F16).

Law firms have adopted strategies to retain high calibre lawyers, which should be investigated with a view to providing links between such firms and NTRBs. For example, many firms are displaying more internal flexibility with their lawyers through offering secondments and other opportunities, rather than losing them permanently to other roles.¹⁷⁶ This creates the further possibility of establishing secondment arrangements between private law firms and NTRBs.

Proposal

The strategy involves running presentations about NTRB career opportunities at major law firms and introducing lawyers to NTRB legal work in other ways, such as, through secondment arrangements between private firms and NTRBs.

These presentations should explain the role and functions of NTRBs and the general attractions of the field – such as opportunities to be involved in innovative legal work and historic agreement making, to travel to remote and restricted access areas, and for diverse cultural experiences. Other incentives referred to by NTRB managers were the unique environment and the diversity of NTRB lawyers' roles, as well as the resulting breadth and transferability of their skills (see also Table F17 which presents incentives referred to by NTRB lawyers).

Given that almost 30% of new NTRB lawyers (those entering the system in 2003 or 2004) have come from a public service background, this sector is an important source of recruits and NTRB career promotion presentations should also be targeted at government department legal staff (see Table F10).

Salaries

There are misconceptions about the relative salary levels of NTRB lawyers. Accordingly, presentations to potential applicants in the private and public sectors should cover salary levels. A significant number of NTRB lawyers, as well as other interviewees, perceived current NTRB salary levels to be a deterrent to greater numbers of applicants. While there

¹⁷⁴ A Neskes, 'Attraction and Retention in a Candidate Scarce Market' (2004) 2 *Shortlist*, p 2.

¹⁷⁵ Half the lawyers interviewed believed that at least two years would be the minimum length necessary for such experience to be valuable.

¹⁷⁶ A Neskes, 'Attraction and Retention in a Candidate Scarce Market' (2004) 2 *Shortlist*, p 2.

is no doubt that senior NTRB lawyers are not paid commensurate with their private sector counterparts, the wages for junior lawyers are much more competitive than many currently realise. Indeed, a number of NTRB lawyers interviewed as part of this Project indicated that as junior lawyers they were paid more to work at an NTRB than other options in private practice. An important factor here are the tax advantages available to NTRB lawyers through salary sacrificing, a benefit worth up to \$7,105 to junior lawyers and \$14,550 to PLOs, and not widely available to lawyers in private practice. This is due to the tax status of most NTRBs as 'public benevolent institutions'. The 'Remote Area Allowance' is another financial benefit available to lawyers at a number of NTRBs. These are strengths that should be highlighted in seeking to promote NTRB careers.¹⁷⁷ Tables E1 presents a comparison of average NTRB lawyers' salaries with those of lawyers in the private sector. Table E2 presents a comparison of the range of NTRB lawyers' salaries with indicative figures provided by Legal Aid in New South Wales and Victoria.

Table E1: Comparison of lawyers' salaries in NTRBs and private practice

Level of experience	NTRB average ¹⁷⁸ (\$'000s)	Private sector average (\$'000s)						
		Top tier law firms					Mid tier law firms	
		Syd	Melb	Bris	Perth	Adel	Syd	Melb
Graduate	59	55	n/a	n/a	n/a	n/a	55	n/a
1 year	63	66	60	44	45	51	64	55
2 years	67	80	72	66	52	58	74	63
3 years	70	93	85	68	58	70	80	74
4 years	75	110	90	82	63	80	88	77
PLO/ Partners ¹⁷⁹	120	820	700	n/a	n/a	n/a	465	395

Source: Consultations, Project Team analysis as at 31 December 2004, Mahlab Recruitment, *Mahlab Survey 2004*, pp 6, 7 and 10 (for private sector averages).

¹⁷⁷ As the cost of living is considerably higher in remote locations than in capital cities, these benefits may be less effective as an inducement to relocate.

¹⁷⁸ These numbers are based on figures provided by 13 NTRBs; which have then been averaged to provide a per NTRB average (note that this is not a weighted average). All figures include superannuation contribution and the maximum tax benefit derived from salary sacrificing which is available to most NTRB lawyers. Some NTRBs also provide additional benefits such as remote location allowances and one airfare home a year. These have been included in the estimates where relevant.

¹⁷⁹ From various interviews we have ascertained the following indicative salary levels for partners in private practice at different levels: junior partners \$250,000; mid-level partners \$500,000; senior partners \$750,000 to \$1.2 million.

Table E2: Comparison of lawyers' salaries in NTRBs and Legal Aid

Level of experience	NTRB ranges ¹⁸⁰ (\$'000s)	Legal Aid (NSW, NT and Victoria) ¹⁸¹ (\$'000s)
Graduate	50 – 67	53 – 54
1 year	57 – 70	56 – 58
2 years	60 – 73	58 – 61
3 years	62 – 73	64 – 65
4 years	63 – 80	66 – 69
PLO	106 – 135	99 – 117

Source: Consultations, Project Team analysis as at 31 December 2004, Legal Aid New South Wales, Northern Territory Legal Aid Commission and Victoria Legal Aid.

Implementation

Organising and running career promotional presentations at major firms in each of the major cities would involve the following:

- identifying and contacting suitable law firms
- preparing and delivering presentations
- providing further information to interested lawyers, and
- preparing other promotional materials (for example, brochures).

A human resources professional dedicated to assisting NTRBs with recruitment (see Strategy 3) ideally would perform these tasks as part of their broader duties. Alternatively, a consultant and administrative support would be required.

¹⁸⁰ These ranges are based on figures provided by 13 NTRBs. As with Table E1, all figures include superannuation contribution and the maximum tax benefit derived from salary sacrificing which is available to most NTRB lawyers. Some NTRBs also provide additional benefits such as remote location allowances and one airfare home a year. These have been included in the estimates where relevant.

¹⁸¹ These ranges are indicative only and are based on figures provided by Legal Aid in New South Wales (personal communication, 1 March 2005), the Northern Territory (personal communication, January and April 2005) and Victoria (personal communication, 16 February 2005). All figures include superannuation contribution and the maximum tax benefit derived from salary sacrificing which may be available. It appears that the Northern Territory Legal Aid Commission and Victoria Legal Aid offer the tax benefits of salary sacrificing to employees but Legal Aid in New South Wales does not do so.

2.2.3 Strategy 3: Independent human resources manager

Each NTRB differs in terms of its structure, organisational processes and operating environment. However, much of what is required for recruitment is common to all NTRBs. In addition, given their small size, many NTRBs do not have the capacity to independently initiate or coordinate the types of recruitment strategies recommended in this Report. Currently, very few NTRBs have a dedicated human resources position and, as mentioned above, recruitment is usually reactive. Moreover, the lack of a systematic procedure can result in a less rigorous recruitment process than required. For example, several interviewees described situations where lawyers were appointed without adequate reference checks.

Proposal

We recommend that a human resources manager be engaged in a full-time capacity, based within an independent entity, to be available to assist NTRBs with legal staff recruitment matters. We note the views of OIPC, which has indicated a preference for “standardised criteria and processes on a national basis in the recruitment of representative body staff”.¹⁸²

A number of interviewees indicated that a human resources professional working across all NTRBs would bring rigour to the system and shift some of the burden from managers who currently spend substantial amounts of time on staffing matters. An NTRB-dedicated human resources position would have the added benefit of being able to undertake promotional activities on behalf of the whole NTRB system, ensuring that NTRBs are visible to law students, legal practitioners and those in other sectors.

The human resources manager would be responsible for implementing the various recruitment and retention strategies proposed in this Report, in particular through:

- establishing and managing a law student NTRB placement program (see Strategy 1)
- facilitating and running NTRB career promotion presentations at law firms (see Strategy 2)
- hosting events aimed at expanding the pool of external counsel available to be briefed by NTRBs (see Strategy 4)
- coordinating the development of an induction program for new NTRB lawyers (see Strategy 5)
- coordinating the development of an ongoing training program for NTRB lawyers (see Strategy 6)
- establishing a scholarship scheme for NTRB lawyers to undertake post-graduate studies (see Strategy 7)
- arranging secondments of NTRB lawyers to commercial law firms (see Strategy 8)
- establishing a management training program for NTRB lawyers (see Strategy 9)
- assisting in the development of model performance evaluation mechanisms for NTRB lawyers (see Strategy 10)
- facilitating greater input from NTRB managers and lawyers into the program development of future native title conferences (see Strategy 11)
- coordinating the development of a web-based NTRB information service (see Strategy 12)

¹⁸² OIPC, Submission to the 2004 Parliamentary Inquiry, p 29.

- building or strengthening the relationship between NTRBs and the commercial law sector (see Strategy 13)
- establishing a mentoring scheme for NTRB lawyers, including through an alumni network of former NTRB lawyers (see Strategy 14)
- arranging management training opportunities for NTRB non-legal managers (see Strategy 15)
- coordinating the development of a professional development program for NTRB field officers (see Strategy 16), and.
- establishing a professional association for NTRB lawyers (see Strategy 17).

The role could also involve:

- assisting NTRBs with job advertisements and selection processes
- advising NTRBs of prospective applicants (this could involve maintaining a database of strong but unsuccessful past applicants to other NTRBs)
- facilitating alternative appointments within the NTRB system for existing NTRB lawyers seeking to move from their current organisation, to avoid the loss of lawyers from the system
- considering options for encouraging extended retention such as through contract completion bonuses or similar incentives
- facilitating the operation of a locum service, whereby short-term vacancies are filled by lawyers working in other sectors of the system, strong but unsuccessful past applicants to NTRBs or NTRB lawyers who have recently left the system
- organising an annual seminar for NTRBs, their external legal advisers and relevant government officials, focusing on practical, legally-based issues facing NTRBs (see Strategy 11)
- facilitating regular meetings of senior NTRB lawyers (in person or via phone- or video-link), and
- providing advice to individual NTRBs where requested on matters such as appropriate pay scales, salary sacrifice arrangements and other employment benefits.¹⁸³

In terms of the proposed NTRB student placement program, the human resources manager would:

- publicise the program (for example, through talks at universities and career fairs, and through ensuring information about the program is included in university publications such as career guides)
- interview applicants and prepare successful candidates for their placement (including discussing NTRBs' roles and responsibilities as well as students' pre-placement expectations)
- monitor and provide ongoing support to the students (for example, through weekly conference calls)
- discuss with NTRBs any issues relating to the placement program
- maintain a list of tasks and assist NTRBs to develop discrete research topics
- liaise with NTRBs in relation to future needs for students – in terms of numbers and timing

¹⁸³ For example, currently there is a lack of communication among NTRBs about the status of NTRBs as public benevolent institutions and the processes involved in acquiring such status. It appears that information on these types of issues would be of value to NTRBs and, thus, a system for coordinating the provision of this information would be beneficial.

- maintain ongoing contact with past interns in order to encourage them at appropriate times to enter the NTRB field, and
- coordinate the involvement of past interns in promotional activities.

Although the scope of this Project is limited to identifying the needs of NTRB lawyers, we recognise that there would be value in a human resources manager taking on the task of NTRB professional recruitment more generally. We suggest that consideration of this be given in future.

Implementation

The above functions would be undertaken by a mid-level professional who has a background working as a human resources manager at a law firm (and, ideally, also as a practising lawyer). The appropriate salary would be between \$80,000 and \$100,000, depending on experience. Following discussions with human resources experts at law firms and in industry, it is apparent that hiring someone with the requisite skills and talent is crucial to the success of the strategies described in this Report. As very few human resources managers would have the specific skills required for this specialised role, careful selection of an appropriate candidate will be critical.

We recommend that such a person be employed by and funded through an independent university-based centre or commercial entity. This is to avoid perceptions of conflict of interest that may arise if such a person were based in a government agency that is accountable not only to NTRBs but also to other parties in native title matters. Also, the Commonwealth is often a litigant or party to proceedings itself and in these circumstances, locating the human resources manager within the government sector could potentially exacerbate sensitivities and inhibit the effectiveness of the role. For example, such an arrangement may give rise to concerns about the government having access to valuable human resources information or suspicions about the adequacy with which recruitment drives are being conducted or the basis upon which salaries are set. Thus, we suggest locating the human resources manager in an independent body. Given the importance of New South Wales and Victoria as a source of NTRB lawyers, particularly in relation to Representative Bodies with offices in cities and towns with populations under one million (58% of those coming from interstate to work in these cities and towns come from New South and Victoria), we suggest that the human resources manager should be based in Sydney or Melbourne (see Part D, Section 6.2).

Further specific consultation will be required to determine details for application criteria, job descriptions and employment conditions. Consideration will also have to be given to ensuring the role is able to be performed in a way that complements the responsibilities of individual NTRBs (and their boards in particular) in this regard, specifically under the *Aboriginal Councils and Associations Act 1976* (Cth). More generally, employment conditions will have to clearly define the role as providing support to NTRBs where required; involvement in activities organised by, or adoption of processes or standards developed by, the human resources manager would not be obligatory.

2.3 Recruitment of Indigenous lawyers

Many participants commented that it would be preferable if there were more Indigenous lawyers working in the system. Several NTRB chief executives raised this issue with us at the NTRB Leaders Forum held in Canberra on 24 March 2004. Others have also sought to pursue strategies for increasing the number of Indigenous staff in NTRBs.¹⁸⁴ Some anecdotal evidence suggests that Indigenous lawyers may be better able to communicate with their clients because of their cultural sensitivity. On the other hand, a number of comments were also received indicating that perceptions of conflict of interest can be a significant impediment to the effectiveness of Indigenous NTRB lawyers.

Despite this interest and the important social justice imperatives behind it, strategies for increasing the number of Indigenous lawyers working in the NTRB field do not fit within the direct scope of this Project. Our research has not focussed specifically on the links between higher numbers of Indigenous lawyers and better native title outcomes. Some anecdotal evidence suggests that Indigenous lawyers may be better able to communicate with their clients because of their cultural sensitivity. However, comments were also received indicating that perceptions of conflict of interest can be significant impediment to the effectiveness of Indigenous NTRB lawyers.

Although we do not present strategies relating to this in this Section, we have undertaken some analysis of relevant issues, including the number of Indigenous law students and graduates at each tertiary institution in Australia and also in New Zealand. A summary of the key findings on this and other issues is provided in Appendix 9.

¹⁸⁴ ATSIC Native Title and Land Rights Centre, 'Draft Framework Paper: NTRB Capacity Building Program', in *Report of the NTRB Leaders Forum* (November 2001) p 6.

2.4 Recruitment of external counsel

Currently, only a limited number of experienced barristers and consultant legal practitioners are regularly briefed to represent native title claimants in legal proceedings. A relatively short list of barristers and legal practitioners was mentioned repeatedly by NTRB lawyers and managers around the country.¹⁸⁵ The Queensland Indigenous Working Group noted in 2004 the lack of external law firms or consultant legal practitioners available who can provide “competent yet cost effective services to NTRBs”.¹⁸⁶ Some have even suggested that the pool is getting smaller, as experienced barristers leave the bar and very few replacements enter the field. Indeed, throughout the entire consultation process the Project Team was advised of only one senior barrister who has taken up native title work since 1999.

It is not surprising then that a considerable number of both lawyers and other respondents commented that there is a need to expand the pool of barristers engaged by NTRBs. According to several judges and barristers interviewed as part of the Project, there are many who would be interested in becoming involved in native title matters if they were approached. However, there is hesitancy from NTRBs towards using barristers without prior native title experience. It is of course recognised that there can be substantial costs involved in engaging legal counsel and consultants and this has to be balanced with the need to maintain operational budgets.

¹⁸⁵ The 2004 Thurtell Report also noted that “[t]he availability of experienced counsel, solicitors, experts and other staff to work on native title cases is relatively limited” (2004 Thurtell Report, p 111).

¹⁸⁶ Queensland Indigenous Working Group, Submission to the 2004 Parliamentary Inquiry, p 13.

2.4.1 Strategy 4: Increase pool of outside counsel involved in native title matters

One option for increasing the pool of outside counsel available to represent native title claimants while avoiding the use of barristers without native title experience is for NTRBs to engage counsel who have represented respondent parties in native title matters. During interviews with a number of such barristers, it became clear that there is an interest amongst this group to appear for claimant parties. Although the majority of non-NTRB interviewees who commented on this issue indicated that the use of such counsel would not pose any difficulties or should in fact be encouraged, over a quarter (28%) thought this could be problematic (see Table F18).¹⁸⁷ It is interesting to note that SWALSC has recently retained Vance Hughston SC, who has historically represented government parties in native title matters.

Proposal

We recommend that promotional activities be designed to encourage more barristers and consultant legal practitioners to enter the native title field. An initial step would be an information session to raise awareness amongst barristers and assist NTRB management to meet prospective counsel. Ideally, events would be held in major cities and towns, with invitees comprising NTRB lawyers and managers, barristers and consultant legal practitioners from in and around each location. Prominent guest speakers with backgrounds in the area should be included.

An annual seminar for NTRB lawyers, outside counsel and relevant government officials focusing on practical, legal issues facing NTRBs could also assist in removing the mystique perceived as surrounding the field by many solicitors and barristers currently not involved in native title matters (see Strategy 11).

Implementation

Organising and running promotional events targeted at barristers and consultant legal practitioners would involve:

- identifying and contacting suitable people and organisations
- organising events including preparing presentations, inviting guest speakers, setting dates and selecting venues, and
- hosting events.

The human resources manager recommended in Strategy 3 ideally would be responsible for these tasks. Alternatively, a consultant and administrative support would be required.

¹⁸⁷ Eight of the 18 respondents on this topic indicated that the engagement by NTRBs of counsel who usually represent respondent parties would not be problematic, five stated that it should be encouraged, four indicated that it could potentially be problematic and one stated that it should be avoided.

3. Retention

3.1 Overview

3.1.1 Background

Over 70% of NTRB lawyers considered that high turnover rates for legal staff inhibit the effective representation of clients (see Table F6). Seventy-five per cent believed that lack of experience in the system is an impediment to the effective representation of clients (see Table F6). Overall, almost all lawyers (96% of respondents) indicated that retention was difficult (see Table F19). Demonstrating this difficulty, in the last six months (that is between October 2004 and March 2005), 22 lawyers have left their current NTRB or have given notice of such an intention. Of these only two have taken legal positions with other NTRBs. It is worth noting that the loss of 20 lawyers represents 26% of the total number of lawyers in the system as at 31 December 2004.

The consequences of high turnover of legal staff cannot be overstated, particularly in a highly specialised area typified by small legal teams and recruiting difficulties.¹⁸⁸ The issue of retention has received considerable attention in the 2004 Parliamentary Inquiry, with at least five different submissions noting difficulties.¹⁸⁹ Retention issues, and their consequences, were also highlighted in the 2004 Thurtell Report.¹⁹⁰

High turnover of NTRB staff:

- is costly
- results in loss of corporate knowledge and history
- leads to recruitment of inexperienced lawyers
- leads to early promotion of junior lawyers, often exacerbating stress levels of those promoted as well as those working with them (particularly if the new role includes management responsibilities)
- contributes to delays in progressing matters
- affects organisational culture and relationships with clients and respondent parties, and
- can result in respondent parties re-opening negotiations of previously resolved issues.

Most participants in the consultation process indicated that it takes six to twelve months for new NTRB lawyers to 'get up to speed'. The average length of time that current NTRB lawyers have been practising in the area is 3.6 years (see Table F20). This is still a relatively short period and means that senior positions may be filled by lawyers with only two or three years NTRB experience.

¹⁸⁸ Large legal firms and government agencies are nowhere near as exposed to the consequences of low retention rates and ill-advised staff appointments.

¹⁸⁹ Goldfields Submission, p 8; NSW NTS Submission, p 20; Torres Strait Submission, pp 3, 5 and 6; Rio Tinto Submission, p 9; OIPC Submission, p 27.

¹⁹⁰ 2004 Thurtell Report, p 111.

3.1.2 Factors affecting retention

NTRB lawyers and other respondents (including former NTRB lawyers) cited the following types of issues as factors affecting retention and deterrents to NTRB work:¹⁹¹

- heavy workloads
- remoteness of NTRB office locations
- disillusionment with outcomes
- responsibility for non-legal roles
- lack of access to resources
- lack of professional support
- difficult organisational structures and processes
- isolation from mainstream legal practice
- political aspects of the role, and
- travel demands (see Tables F21 and F22).¹⁹²

It should also be noted that there are changing trends in the employment market more generally which may also be contributing, to some extent, to the retention challenges facing NTRBs. Emerging research on ‘Generation Y’ employee profiles (namely, the rise in employee skill-levels¹⁹³ and mobility) indicates that the types of strategies proposed in this Report will become increasingly important for employers more generally in retaining staff.¹⁹⁴

Workloads and work pressures

Approximately 85% of NTRB lawyers believed that “too much work” was inhibiting effective client representation in the NTRB system generally, and 54% felt that their own workload was “too heavy” (see Table F6; Table F23). For example, one NTRB lawyer commented: “workloads are unmanageable – it is literally not possible for us, even with the most highly experienced and capable staff, to do more than scratch the surface”. Another said, “I think there is enough work for twice the number of lawyers than we have. We only do the high priority stuff. It’s a shame because disputes fester and languish, internal group disputes go on for years, making them worse”. Five of the seven NTRBs that made a submission to the 2004 Parliamentary Inquiry also noted onerous workloads as an issue.¹⁹⁵

¹⁹¹ Note that respondents were asked to consider issues beyond salaries and funding levels; nevertheless many expressed frustration with funding levels and processes.

¹⁹² The 1999 Love-Rashid Report also observed similar factors affecting retention of professional management personnel (1999 Love-Rashid Report, pp 21 and 25).

¹⁹³ According to Phil Ruthven, chairman of IBIS Business Information, “[Generation Y] will be even more highly skilled than any other generation in history” in M Saville, ‘The future is e-me’ (26 February 2000) *The Sydney Morning Herald*, http://highered.mcgraw-hill.com/sites/dl/free/007470589x/57152/end_chapter_cases02.doc at 1 April 2005, p 95.

¹⁹⁴ See: H De Cieri and R Kramar, *Human Resource Management in Australia: Strategy People Performance*, McGraw Hill, Macquarie Park, NSW (2003); and M Saville, ‘The future is e-me’ (26 February 2000) *The Sydney Morning Herald*, http://highered.mcgraw-hill.com/sites/dl/free/007470589x/57152/end_chapter_cases02.doc at 1 April 2005, p 95.

¹⁹⁵ ALRM Native Title Unit Submission, p 3; Goldfields Submission, pp 5, 7 and 8; Ngaanyatjarra Submission, pp 2 and 3; NSW NTS Submission, pp 5 and 6; Torres Strait Submission pp 1-3 and 6-9.

Work hours are generally fairly long: the average for an NTRB lawyer was just under 55 hours per week (see Table F24).¹⁹⁶ However, the distinction between work hours and work pressures is critical here. It became apparent from our interviews that NTRB lawyers work in an overly stressful environment due to complex and often difficult relationships with clients, significant travel demands,¹⁹⁷ lack of support structures, often harsh physical environments, resource constraints and the uncertainty of native title law. One lawyer described their work as follows:

[It] is absolutely amazing at one level because of the type of work; I feel incredibly privileged to have access to the types of people and content and opportunities for learning. But at the same time it is very difficult because of the level of resources and the complexity of taking instructions from a group. The absolute and deliberate resource deprivation is incredibly wearing. It is intellectually and emotionally exhausting because the stakes are so high. You have to wear your clients' anger and frustration.

The prolonged duration of most matters (as referred to below) can add another layer of frustration.

Remoteness and access to resources

Although NTRB lawyers are generally reluctant to work in remote settings, due to family and lifestyle concerns, in practice it seems that remoteness is affecting fewer NTRB lawyers. Indeed, there has been substantial 'de-regionalisation' by a number of NTRBs in the past five years. As at 31 December 2004, 45% of NTRB lawyers were based in cities with populations exceeding one million. A further 21% were located in Cairns (eight lawyers), Alice Springs (four) and Mackay (four). The remainder were located in ten different locations. There were four NTRB offices in which there was only one lawyer (see Table D2).

These figures reflect the fact that physical remoteness is becoming less of an issue for NTRBs, however, the issue of professional isolation remains. Sixty per cent felt that lack of access to professional support and advice was a factor inhibiting effective client representation (see Table F6). One lawyer commented: "Rep bodies need something to address the isolation – native title itself is an isolated field but it is even more isolating within NTRBs, because we are all so overworked it is hard to get hold of people".

Also contributing to dissatisfaction among a considerable number of NTRB lawyers were perceptions of inadequate access to relevant resources. Although the lawyers were almost evenly divided between those satisfied with the level of access to resources available and those dissatisfied, almost 12% indicated they were very dissatisfied. Only 5% stated they were very satisfied (see Table F25). Most of the "dissatisfied" responses were received in Western Australia and Queensland, likely reflecting the higher number of lawyers situated in smaller towns than main cities in those States. Indeed, 47% of those expressing dissatisfaction came from cities or towns with populations under one million (see Table F25). The highest percentage of positive responses was received in the

¹⁹⁶ Thirty per cent of NTRB lawyers indicated they worked on average between 60 and 80 hours per week.

¹⁹⁷ More than half of the NTRB lawyers interviewed raised concerns about the amount of travel involved in their work and viewed the travel demands on NTRB lawyers generally as an impediment to effective client representation.

Northern Territory, reflecting the relatively long histories and greater resourcing of the CLC and NLC (see Table F25 for a State-based breakdown of responses).¹⁹⁸

Disillusionment with outcomes

The perception in the general community, and among prospective and existing NTRB lawyers, is that the native title system provides only minimal outcomes for Indigenous claimants (and at a high price). This has an effect on recruitment and retention. The following quote from an experienced, senior NTRB lawyer who recently left the system bears this out: “[m]y decision to resign was primarily a result of frustration with the whole native title system”. These perceptions are also reflected in comments from many other interviewees, who have indicated that the field of native title law has lost much of the attractiveness it enjoyed in the early 1990s.

Furthermore, many NTRB lawyers commented negatively about the protracted nature of native title matters. While over half (53%) of the 61 respondents to this question (including both current and former NTRB lawyers) indicated that they had been involved in at least one matter from initiation to completion, the vast majority of these were referring to negotiations or discrete elements of the claims process, and only five responded they had been involved in one or more claims from lodgement to determination (see Table F26).¹⁹⁹

At the same time, however, some interviewees suggested that the Federal Court’s approach of dealing with native title matters expeditiously,²⁰⁰ as with all other matters before it, is inappropriate when lack of funding limits an NTRB’s capacity to properly progress a matter.²⁰¹ Furthermore, the Court’s approach has been said to be inconsistent with the significant procedural aspect of native title that requires a claim to be lodged before the benefits of the (albeit limited) procedural rights under the *Native Title Act* can be exercised.²⁰² This issue was similarly raised in the 2004 Williams and Bauman Report where it was stated that “[t]imelines were often seen to meet non-Indigenous agendas, and to be imposed by the Federal Court to expedite matters”.²⁰³

In addition, a number of interviewees cited the following as key gaps that can undermine the efforts and achievements of NTRB lawyers and other staff in representing their clients:

¹⁹⁸ Unlike other NTRBs, the NLC and CLC receive separate funding for analogous functions under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) which established these bodies as statutory authorities.

¹⁹⁹ It should be noted that NTRB lawyers did not specifically refer to the infrequency of matters being finalised or resolved as a source of frustration.

²⁰⁰ For example, KLC’s applications to adjourn the *Wanjina* and *Bardi and Jawi* matters were both refused: Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2001*, HREOC, p 63; Official Hansard transcript of hearing, Inquiry into Indigenous Land Use Agreements, Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, Broome (July 2001), www.aph.gov.au/hansard/joint/commttee/j4996.pdf at 1 April 2005, p 389. For further discussion on this, see Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2001*, HREOC, p 60.

²⁰¹ See comments by Justice Merkel on this in the *Rubibi* matter: Transcript of Proceedings, *Rubibi Community v The State of Western Australia* (Federal Court of Australia, Merkel J, 1 June 2001).

²⁰² K Guest, *Are Native Title Litigants ‘Exceptional Litigants’? Infusing Human Rights Standards into Federal Court and Commonwealth Native Title Decision Making*, unpublished paper delivered at the Native Title Conference, Townsville (August 2001).

²⁰³ 2004 Williams and Bauman Report, p 6. See also p 24.

- lack of appropriate funding and other support for Prescribed Bodies Corporate (PBCs) and Registered Native Title Bodies Corporate (RNTBCs)²⁰⁴
- absence of best practice approaches to agreement making, and
- lack of adequate monitoring of the implementation of agreements.²⁰⁵

Although the scope of this Project is limited to the native title aspects of NTRB lawyers' work it has been noted that for many NTRBs, native title is not the only avenue for pursuing land justice for their constituents. This may be relevant in examining options for addressing disillusionment among NTRB lawyers.

PBCs and RNTBCs

Concerns have been raised by many NTRB lawyers, managers and others working in the native title system about the capacity, due to lack of funding, of RNTBCs to fulfil their obligations, and their relationship with NTRBs.²⁰⁶ This is contributing to a growing disillusionment around the value of native title determinations. The 2002 ATSIC RNTBC Report estimated that by 2005-06, between \$16.8 million and \$32.8 million²⁰⁷ will be needed to cover the establishment and operational costs of the estimated 58 RNTBCs expected to have been incorporated by that time.²⁰⁸ By 2007-08, by which time it is estimated there will be 75 RNTBCs, the cost will be between \$16.9 million and \$35.9 million.²⁰⁹ Yet, since the publication of this assessment over two years ago, there has been no indication of any increased allocation of funding to NTRBs or other bodies to cover these costs.

Issues around the appropriate establishment, management and ongoing operation of PBCs and RNTBCs are of emerging significance not only in the context of required skills for NTRB lawyers, but also in relation to the broader issue of staff retention in the system.²¹⁰ Many submissions to the 2004 Parliamentary Inquiry into NTRBs have noted the absence of a strategy or policy at any level of government directed at ensuring that

²⁰⁴ For a definition of PBCs and RNTBCs, see Section 3.6.5 in Part C above.

²⁰⁵ M Allbrook and M A Jebb, *Implementation and Resourcing of Native Title and Related Agreements*, Research commissioned by the National Native Title Tribunal for seminars held in Melbourne and Brisbane (February 2005) p 3. See also J Altman, *Partnering sustainable regional development: Indigenous community organisations and miners*, CEDA Research Project (2002), www.ceda.com.au/Research/New/Publications/Files/altman.pdf at 1 April 2005; and R Kelly and C O'Faircheallaigh, 'Native title, mining and agreement making: best practice in commercial negotiations' (2002) *Native Title and Cultural Heritage in 2002*, p 9.

²⁰⁶ 2002 ATSIC RNTBC Report, pp 2-5 and 22-24; A Murphy, 'Prescribed Bodies Corporate in the Post-Determination Landscape' (2002) 5 *Balayi: Culture, Law and Colonialism*, p 165. In her article, Murphy notes that all of the 16 PBCs in the Torres Strait are entirely unfunded and are without offices, telephones or any administrative support. See also: R Levy, *The Recognition and Protection of Traditional Interests Under The Native Title Act 1993*, paper prepared for the Native Title Conference, Townsville (August 2001); and C Manziaris and D Martin, *Native Title Corporations – a legal and anthropological analysis* (Sydney: The Federation Press, 2000).

²⁰⁷ The estimated cost varies depending on the funding model used. These numbers have been rounded to one decimal place.

²⁰⁸ 2002 ATSIC RNTBC Report, pp 54-62.

²⁰⁹ *Ibid.* These numbers have been rounded to one decimal place.

²¹⁰ It should be noted that participants in the interview process were not specifically asked whether concerns relating to PBCs were having an impact on lawyers' sense of job satisfaction and consequently retention rates. Rather, this is a prediction put forward by the Project Team.

PBCs and RNTBCs are able to function sustainably.²¹¹ The 2002 ATSIC RNTBC Report noted this in the following extract:

RNTBCs currently receive no government funding to perform their statutory functions under the [Native Title Act] or meet their regulatory compliance obligations under the [Aboriginal Councils and Associations Act]. Nor do NTRBs receive adequate funding for the discharge of their statutory functions under the [Native Title Act], which impacts particularly on their capacity to provide assistance to RNTBCs. As a result, existing RNTBCs are, on the most part, essentially dysfunctional, have no infrastructure and are unlikely to be meeting existing regulatory compliance requirements... They are accordingly vulnerable to failure and being wound up. This would put at risk both the protection and management of native title, and the certainty required by land and resource management stakeholders.²¹²

The practical implications of the lack of infrastructure were noted by Justice North in His Honour's reasons for judgment in the *Nangkiriny* matter. Justice North refers to the issue of capacity of PBCs and quoted a submission from the applicant which reads:

The [Karajarri Traditional Lands Association, a PBC] has no office, no telephone and no fax machine. As the chairman has stated, 'I may be the Chairman, but we can't afford a chair'. The lack of basic equipment means that its capacity to hold meetings, respond to Future Act notices and otherwise carry out its functions... is severely limited.²¹³

Non-legal tasks

Although all NTRB lawyers interviewed accepted that their role should involve a certain number of non-legal tasks,²¹⁴ 58% believe they are performing non-legal work "too much" (see Table F27; see also Table F28 which shows the proportion of time lawyers estimated they spent on non-legal tasks). The main types of non-legal tasks performed by NTRB lawyers included:

- administrative and secretarial duties
- organising meetings
- dealing with non-native title concerns of claimants
- managerial duties
- dispute resolution, and
- logistics (for example, organising meeting rooms, catering and travel for claimant group members) (see Table F29).

²¹¹ See submissions from the following organisations: Association of Mining and Exploration Companies, p 3; NSW NTS, p 26; Goldfields, pp 3 and 6; Ngaanyatjarra Council, pp 2 and 4; Rio Tinto, p 10; Office of Native Title, Western Australia, p 5; Torres Strait, pp 1-3, 5-6 and 8-9; Northern Territory Government, pp 3-4.

²¹² 2002 ATSIC RNTBC Report, p 4.

²¹³ *Nangkiriny v State of Western Australia* [2004] FCA 1156, para 9.

²¹⁴ Many noted in particular that the NTRB environment is substantially different to that in private legal practice and were well aware of the resource constraints faced by their employers. Due to these factors, the lawyers were generally quite accommodating in terms of the number and type of non-legal duties they were prepared to undertake.

Many felt that their organisation's processes could be improved to ensure better allocation of tasks and more efficient use of the time and skills of different staff members. One lawyer explained it as follows:

Lawyers are frequently relied upon to make things work. Inadequate systems 'limp along' and 'get by' on the strength of there being enough generously-minded, hard-working and smart people who do other people's jobs for them. The result, naturally enough, is that those smart and motivated people get burned out, alienated, or leave or their skills remain underdeveloped and they get resentful.

In addition to the frustration caused when this does not occur, there can be other problems, as the following example from the 2004 Williams and Bauman Report highlights:

NTRB staff often find themselves in the difficult position of having conflicting responsibilities of facilitating or chairing meetings while, at the same time, providing technical or legal advice. It is important to separate the procedural responsibilities of managing meetings from the substantive responsibilities of advising the meetings. Mixing responsibilities makes it difficult for someone, who is advising a meeting, to be perceived as neutral and impartial if there is dissent in relation to that advice.²¹⁵

Other issues identified as contributing to lawyers' work dissatisfaction included dissatisfaction with the physical environment of their workplace,²¹⁶ insufficient support staff²¹⁷ and lack of access to adequate equipment and facilities²¹⁸ (see Tables F6, F30 and F31).

3.1.3 Strategies

Currently, there is no coordinated system within NTRBs for developing expertise and there are only informal methods for facilitating communication among NTRB lawyers. Individuals develop their own networks of contacts and mentors and their own systems for storing and sharing information and seeking advice. NTRB lawyers are working in high stress environments for a variety of reasons and these approaches do not provide them with the coordinated support they need to overcome this.

Strategies designed to enable lawyers to best manage the pressures of such a work environment must be focused on making them feel more capable in what they are doing. This can be achieved by (a) enhancing the professional development of NTRB lawyers and (b) improving the support structures available to them. Strategies relating to professional development include induction training, ongoing training, scholarships for further study and secondments to other organisations. Strategies for improving support structures include information and communication services, organisational support as well as external mentoring and relationship-building opportunities. Several of the strategies

²¹⁵ 2004 Williams and Bauman Report, p 26.

²¹⁶ For the purpose of the interviews, "physical environment" was defined to refer to office layout (including levels of privacy and noise), building quality, safety, lighting and heating/cooling systems. More NTRB lawyers responded that they were satisfied with the physical environment than the number indicating they were dissatisfied. However, over 10% indicated they were very dissatisfied.

²¹⁷ Seventy-one per cent of NTRB lawyers indicated that insufficient numbers of support staff inhibited effective client representation. Further, 34% of lawyers strongly agreed and 26% agreed that a lack of sufficient quality support staff also inhibited effective client representation. Thirty per cent disagreed (see Table F6).

²¹⁸ This issue was raised as a matter of concern by 54% of NTRB lawyers.

presented in this Section are expected to have an impact on recruitment as well as retention. Many of these types of programs are common across the private legal sector.

NTRB annual reports have included the following possible suggestions to address retention difficulties:

- strategies such as flexible work arrangements to accommodate parenting needs or other circumstances where productivity can be maintained or improved²¹⁹
- the development of systems to minimise staff stress²²⁰
- skills development²²¹
- career development²²²
- capacity building,²²³ and
- programs that reward exceptional individual staff.²²⁴

The strategies presented in this Section take into account these types of approaches and initiatives preferred by NTRBs.

Early in the consultation process, the idea of a centralised advisory service for NTRBs was raised as a possible tool for assisting NTRB lawyers. The concept involved the establishment of a body of experienced lawyers dedicated to providing support to NTRB lawyers in the fulfilment of their professional functions. It is understood that a similar concept had been raised in the mid-1990s with mixed responses from stakeholders but was not implemented.

Participants in the interview process were asked their views on the idea of such a service and considerable feedback was received – some favouring the use of such a service, and others strongly opposed to the idea. Early on it became obvious that such a body would only have a chance of operating constructively and successfully if it were to be run by an independent entity outside government, staffed by skilled lawyers with extensive practical experience. In addition, the unit would need to be offered as an optional support service to NTRBs, and not imposed upon them.

Once the majority of interviews were completed and a range of views on the centralised advisory service had been received, the Project Team specifically consulted various NTRB principal legal officers and senior lawyers and certain outside counsel to NTRBs.

It became evident that there were widely divergent views and some significant concerns regarding the idea. The viability, cost and location of such a central advisory service were among the major concerns. Under these circumstances, the central advisory service concept has not been pursued and is, therefore, not among the strategies suggested in this Report.

²¹⁹ Cape York, *Annual Report 2003-04*, p 25; QSRB, *Annual Report 2002-03*, p 42.

²²⁰ Central Queensland, *Annual Report 2002-03*, p 45.

²²¹ KLC, *Annual Report 2003*, p 39.

²²² Torres Strait, *Annual Report 2002-03*, p 12.

²²³ Ngaanyatjarra Native Title Unit, *Annual Report 2002-03*, p 8.

²²⁴ Torres Strait, *Annual Report 2002-03*, p 12.

However, we would recommend that, once the major strategies in this Report have been implemented, the concept of an independent central advisory service that is available to NTRBs on an optional basis be reconsidered. We do not wish to pre-judge the outcome of any such future considerations.

3.2 Enhancing professional development for NTRB lawyers

3.2.1 Strategy 5: Induction program for new NTRB lawyers

New lawyers in the NTRB system often struggle to come to grips with the diverse aspects of their roles and the pressured environment in which they work. Whether the result is stressed lawyers or early resignations,²²⁵ this situation can be damaging and frustrating for claimants and is costly for the system as a whole. Despite this, and widespread calls for better access to relevant training, there is currently an absence of any comprehensive training developed specifically for NTRB lawyers. The 2004 Williams and Bauman Report identified induction training as a “core training need” and recommended that OIPC identify the resources required for the development of a standard induction process.²²⁶ In the few regions where induction training is provided to new NTRB lawyers, the focus is on the organisation’s administrative arrangements and the programs are widely regarded as preliminary orientation sessions only.

Induction training is considered standard across most of the private legal sector. The fact that most new NTRB lawyers come to their role with minimal prior native title and commercial law experience only amplifies the need for such training. Moreover, the high turnover in the system results in a large number of new lawyers who then require this kind of support – as at 31 December 2004, 29% of all NTRB lawyers were new to the system, having joined in 2004.²²⁷

The objectives of induction training in this context are to:

- accelerate the work readiness of NTRB lawyers
- increase lawyer retention through greater job satisfaction, and
- facilitate improved approaches to native title legal practice.

In the longer term, it is expected that induction training would assist in ensuring the preservation of, and access to, critical organisational knowledge.

Existing induction training and programs

Currently, on-the-job learning is almost the only means by which new NTRB lawyers develop the specific skills that they need to perform their roles effectively. Many interviewees, from both within and outside the NTRB system, have commented that this approach can result in delays and cause undue stress for new lawyers which, in turn, can result in early resignations.

²²⁵ Many NTRB lawyers are employed on short-term contracts (one to three year) due to the financial constraints and budget cycles of NTRBs. Departure on completion of a contract in mainstream legal practice is not generally considered a resignation. In the NTRB context, however, the intention of most NTRBs is usually to continue renewing the contract as funding is made available. Thus, the departure of an NTRB lawyer at the end of a contract period is often considered an “early” resignation.

²²⁶ 2004 Williams and Bauman Report, pp 20 and 31.

²²⁷ The 2004 Williams and Bauman Report also notes the need for a standardised induction process, due to the “[h]igh levels of staff turnover and the fact that many of those engaged by NTRBs are new to their profession”. The report suggests such training should cover issues relating to decision-making and conflict management as well as local cultural issues and perspectives (2004 Williams and Bauman Report, p viii). The report identified that lawyers would “benefit from information which assisted them in better understanding the groups they represent” (2004 Williams and Bauman Report, p 22).

Most NTRB lawyers (83%) have not received any form of induction into NTRB work, despite an even greater proportion (90%) considering inductions to be of value (see Table F32).²²⁸

Analysis of NTRB organisational materials further attests to the limited availability of induction programs or materials. Only three NTRBs, one in Queensland and two in the Northern Territory, were found to have induction materials. In these cases, the materials are not specifically targeted to NTRB lawyers and do not address the topics that NTRB lawyers indicated would be valuable (see Table E2). There are a number of aspects of existing induction manuals (including structural features) that will, however, be useful in compiling more comprehensive induction materials. A number of other NTRBs are in the process of putting in place, or have previously attempted to establish, induction processes. However, for many this has not been possible due to resource and time constraints, given the other priorities of NTRBs.

Lawyers' preferences for induction content and format

We have established that NTRB lawyers desire a comprehensive induction course that:

- introduces new lawyers to key features of the NTRB operational environment (including statutory, political and professional aspects)
- presents significant legal, political and organisational information, including backgrounds on the history, politics and dynamics of communities in the region in which the lawyers are operating, and
- involves skills-based learning in areas such as advocacy, diplomacy, drafting, conducting effective meetings, conflict management, cross-cultural and interdisciplinary communication, use of plain English, and Federal Court practice and procedure.

The following table lists the wide range of topics NTRB lawyers indicated should be covered in induction training, reflecting the diverse aspects of their roles.

Table E3: Topics to be covered in induction sessions, suggested by NTRB lawyers

Issues around client relations	Legal practice aspects
Cross-cultural awareness and communication	Legal and professional ethics
Understanding client community context	Commercial negotiation
Mediation of intra-client disputes	Drafting commercial agreements
Taking instructions and ascertaining consensus	Knowledge of particular areas of law, eg mining
Running claim group meetings	Litigation
Plain English	Mediation, negotiation and arbitration
Basic principles of anthropology	Understanding of native title law and practice
Aboriginal languages	Practice management
	Drafting court documents
	Organisational systems and procedures

Source: Consultations

²²⁸ Fifty-four NTRB lawyers responded to this question. All of the nine principal legal officers who responded believed inductions to be of value.

Additional aspects that other interviewees suggested would be useful to cover in NTRB lawyer inductions include:

- managing contracts and consultants
- general discovery rules
- genealogy concepts
- human resources management
- political analysis, and
- non-native title outcomes (see Table F33).

Of the 36 NTRB lawyers who commented on induction format, just under 40% indicated a formal course would be their preference and 25% preferred a written manual (see Table F34).

In their comments on the best ways to design induction training, NTRB lawyers and others suggested incorporating the following features:

- a structured program that is communicated using informal approaches
- manuals provided to new lawyers, with dedicated periods of time set aside for the information to be discussed, and
- claimants involved in the delivery of induction sessions.²²⁹

A considerable number of those interviewed who believed an induction course would not be valuable explained that this was because they felt the information and skills NTRB lawyers need could only be gained through on-the-job learning. However, given the relatively short period lawyers are currently staying in the NTRB system, there is a need for strategies to quickly imbue NTRB lawyers with the requisite knowledge and skills.

Proposal

Ideally, induction training would be provided to all new NTRB lawyers within their first two months in the system. However, given the small size of the NTRB network and the relatively low number of new lawyers entering the system each year, this may be financially unrealistic. It would also mean that inductees would miss out on the benefits of group learning. Alternatively, we propose that two induction training courses be run annually, six months apart, and at different locations. Every lawyer who joins the system would participate in training within six months of commencing work. By bringing new NTRB lawyers together, these induction training courses offer a valuable opportunity to initiate the establishment of supportive, ongoing relationships among lawyers. It would be expected that the frequency of the courses is reduced in future years once retention rates have increased.

Induction manual

To assist new lawyers awaiting induction training, they should each be supplied with an induction manual. This would contain information about the operational environment of NTRBs, the historical and political context of the communities they will be working with, and an introduction to key legal practice areas and native title issues. The manual would

²²⁹ A similar message was received during workshops held as part of the Indigenous Mediation and Facilitation Program, with the report on the program noting the need for legal practitioners to participate in inductions “conducted by Indigenous staff” (2004 Williams and Bauman Report, p 22).

also be used as the basis for training sessions. Experienced lawyers would be provided with a copy of the manual and given the option of attending the induction training.

The content of the manual should be detailed and targeted. Its contents would be nationally consistent but would also contain localised content, as understanding regional and local cultural factors is critical for all NTRB staff. Accordingly, assistance would need to be provided to each NTRB to ensure they are able to contribute appropriately.

A variety of people and organisations would need to be involved in the preparation of the manual to ensure its value and effectiveness. Discussions have already commenced with the Federal Court about developing a section of such a manual to assist new lawyers in working with the Federal Court.

Induction training course content and format

The induction training courses would be delivered as group-based induction sessions targeting relevant skills including negotiation, dispute resolution, commercial drafting, researching, report writing and communicating with clients. It would also focus on legal practice areas such as property law, commercial law, trusts, contracts, tax, administrative law and constitutional law. The sessions should be facilitated by a diverse range of people, including experienced NTRB lawyers, outside counsel, Tribunal members and staff, Federal Court staff and Indigenous community members. In particular, sessions dealing with communicating with clients and dispute resolution should involve claimants. A diverse range of training formats, including lectures and workshops, should be used selectively as appropriate.

The design of the NTRB induction training program would draw upon experience of commercial law firms in developing and delivering training to new staff.²³⁰ Existing training programs run at such firms indicate that there is a need across the profession for formal legal and skills training in relation to commercial law and litigation (see Appendix 4).

Cross-cultural communication

Many of the roles and skills relevant to NTRB lawyers are specific to the NTRB context and go beyond those required of most mainstream lawyers. One critical area of this type is cross-cultural awareness and communication. The challenges that NTRB lawyers generally face in communicating with clients relate to assessing levels of consensus, informed consent, dealing with intra-Indigenous disputes and clients' expectations (see Table F35).²³¹ Many NTRBs and others have recognised the need for particular training for NTRB staff on communication with clients.²³²

In respect of these particular issues, introductory sessions should be developed and delivered to all new NTRB lawyers on:

²³⁰ See Strategy 13 which suggests a number of avenues through which commercial law firms could be encouraged to support NTRBs, including through providing access to their resources and advice on non-native title matters.

²³¹ See also Table F36 which presents NTRB lawyers' views on the barriers to effective communication with clients and the issues that arise in taking instructions.

²³² For example, the 2004 Williams and Bauman Report notes that "legal practitioners would benefit from information which assisted them in better understanding the groups they represent" (2004 Williams and Bauman Report, p 22).

- developing sensitivities to recognising and understanding the cultural protocols that should be observed
- communicating effectively with people of different cultural and language backgrounds, particularly in relation to complex legal strategies and concepts, and
- taking instructions and other dealings with a client group (as opposed to an individual client), particularly where there is a dispute within the group.²³³

In addition, greater opportunity for unstructured social interaction with local communities and their leaders should be facilitated.

It must be stressed that it is vital for Indigenous community members to be centrally involved in the process of developing cross-cultural understanding among NTRB lawyers and their claimants. Ideally they would be claimants or members of local Indigenous communities who could explain the historical and political background of claimant groups that are of critical importance. Appropriate support would need to be provided to these guest presenters.

Professional legal ethics

Legal and ethical issues specific to the NTRB context pose significant challenges for NTRB lawyers. For example, lawyers at most private law firms do not face the challenge of the legal and ethical complexities arising in situations where there are multiple client group members or where clients' instructions are inconsistent with law firm policies.²³⁴ These are complex issues which several NTRBs have struggled to resolve. Legal and professional ethics issues are also raised in situations where there are overlapping claims. The 2004 Williams and Bauman Report recommends that a workshop be held to develop best practice approaches to these situations.²³⁵

The Project Team cautions that these complexities need to be addressed – it is clear from our research that junior lawyers in particular are in need of substantial direction on how to handle these situations. New NTRB lawyers need to be aware of the situations in which such issues can arise, and have an understanding of the legal and ethical principles relevant to managing such situations. A session on these matters during induction training would be indispensable. Ideally, each NTRB would have a policy to clarify the obligations of their lawyers, and an explanation of this would be provided to new lawyers as part of their induction training.

Rather than being tackled on an informal, individual NTRB basis, policies on these issues need to be developed consistently across the NTRB system through dialogue among NTRBs. Consistency in approach will help to ensure the strength of the position ultimately agreed upon. Such dialogue is promoted through communication and knowledge sharing across the NTRB system. Strategies 12 and 13 below deal with this in more detail.

²³³ For an explanation of the purpose and importance of group meetings in the context of native title applicants, see: 2004 Williams and Bauman Report, p 25.

²³⁴ While 69% of NTRB lawyers thought it crucial that new NTRB lawyers are provided with some training focusing on dealing with multi-person claim groups, less than 25% had received any training on this.

²³⁵ 2004 Williams and Bauman Report, p ix.

Implementation

Establishing an induction training program will involve the following:

- developing and distributing induction manuals
- preparing content
- running sessions, and
- administering participation of NTRB lawyers in sessions.

Induction training sessions should be prepared and delivered under the umbrella of an existing academic institution. We suggest that such training and associated materials be prepared by two researchers. Input from professionals practising in the area would also be necessary. Preparation of these materials would require use of existing publications and other resources, for which usage charges may be incurred. We recommend that two presenters and relevant guest speakers be involved in the delivery of each of the induction training sessions. The proposed human resources manager (see Strategy 3) ideally would have responsibility for arranging timing of the courses and for coordinating attendance of new NTRB lawyers.

3.2.2 Strategy 6: Ongoing training for lawyers

Seventy-five per cent of NTRB lawyers agree or strongly agree that lack of training is a factor inhibiting effective client representation in the NTRB system (see Table F6).²³⁶ It is clear from our research, and that conducted by other bodies, that NTRB lawyers have a range of critical and overlapping training needs.²³⁷ In particular, NTRB lawyers seek training opportunities to expand their areas of expertise – in legal, cultural and commercial contexts – and to enhance their ability to keep abreast of developments in the native title field. Ongoing training for lawyers (from junior levels up to partners) is standard in most commercial law firms; the need for training in the native title context is amplified by the dynamic nature of the field, the variety of relevant legal practice areas, issues of professional isolation, lack of time for proper mentoring, and the large numbers of junior lawyers in the system – 37% of NTRB lawyers joined the system in 2003 or 2004 (see Table F7). The need for ‘special purpose’ courses for NTRB lawyers is also supported by a parallel need identified in recent research into NTRB anthropologists.²³⁸

It is anticipated that induction and ongoing training strategies will complement each other in developing the expertise and confidence of NTRB lawyers. The induction program should comprise preliminary training for new lawyers only, while the ongoing training is intended to deliver more substantive content directed at further developing skills appropriate to the expanding roles and responsibilities of more experienced NTRB lawyers.

Training needs

During the consultation process, participants were asked to comment on the importance of over 40 aspects of NTRB work and the need for training in relation to each. NTRB lawyers mostly responded that no formal training had been provided on any of those aspects. The reason for our focus on formal training is because time pressures on managers, resource constraints and travel commitments mean that on-the-job training can be difficult and inconsistent; it is not a reliable means of imparting knowledge. As one NTRB lawyer noted, “on-the-job training is not enough because you make mistakes along the way. This causes damage in terms of relationships and as a result delays” (see Table F37).

Of the 44 aspects NTRB lawyers were asked about, the following 13 were considered crucial to NTRB lawyers’ performing their roles effectively by at least 50% of NTRB lawyers (see Tables F38, F39, F40 and F41).

1. Taking instructions from clients

The task of taking instructions from claimants in the native title context is distinct from this same task in other fields of law, mainly because of the group environment from which instructions must generally be sought. Our interviews made clear that some

²³⁶ Nineteen per cent strongly agreed, 56% agreed, 19% had no strong opinion on this and 6% disagreed.

²³⁷ 2004 Williams and Bauman Report, pp 19, 22 and 31. The need for the identification of appropriate professional development programs for relevant NTRB staff had also been raised previously through the ATSIC Capacity Building Program (ATSIC Native Title and Land Rights Centre, ‘Draft Framework Paper: NTRB Capacity Building Program’ in *Report of the NTRB Leaders Forum* (November 2001)). A number of submissions to the 2004 Parliamentary Inquiry have also identified the need for staff training within NTRBs (OIPC Submission, p 27; Queensland Indigenous Working Group Submission, p 13; John Basten QC Submission, pp 4-5; Rio Tinto Submission, p 13).

²³⁸ 2004 Anthropos Report, p 37.

junior lawyers were unsure at times about who they should be taking instructions from (see Table F42). Language barriers between lawyers and claimants, and the politically and emotionally charged nature of the issues are additional unique factors.²³⁹

Sixty-five per cent of lawyers believed the ability to effectively take instructions is crucial to the provision of efficient legal representation. Seventy-nine per cent believed that training in taking instructions is crucial to new lawyers. However, 83% of lawyers had not received any training in this.

2. *Communicating with clients*

Almost 80% of NTRB lawyers believed that the ability to communicate with clients is crucial to effectively fulfilling their role,²⁴⁰ and 82% believed that training in this area is crucial for lawyers new to the NTRB system. Eighty-five per cent of lawyers had not received training in this skill.

3. *Advising clients on legal process and options*

This was widely regarded by NTRB lawyers as crucial to the provision of adequate representation to clients.²⁴¹ Three-quarters of lawyers believed that training on advising clients is crucial for new NTRB lawyers. However, 74% indicated that they had received no such training. The importance of this aspect of NTRB lawyers' roles was also raised in the 2004 Williams and Bauman Report which noted that the "ability to provide clear information and recommendations that help applicants to make informed decisions for themselves"²⁴² is fundamental to the responsibility of NTRB lawyers for negotiating and asserting the rights of their clients.

4. *Other interactions with clients that involve cross-cultural sensitivity*

Another unique aspect of practice for NTRB lawyers is the cross-cultural context in which they operate. This environment demands special skills, for example a knowledge of local cultural protocols. Fifty-eight per cent of NTRB lawyers responded that an awareness of these cultural sensitivities is a crucial aspect of providing effective legal representation. A significantly greater number (71%) believed that training new lawyers in skills of cross-cultural interaction is crucial; 65% stated that they had not received any training in these aspects of their legal role.

We received similar responses in relation to the importance of awareness and understanding of local Indigenous culture and history. Fifty-four per cent of lawyers believed having an appreciation and awareness of this is crucial to the effective performance of their role. Fifty-nine per cent indicated it was crucial that new NTRB lawyers be educated about the culture and history of claimant groups in the region they are practising, yet 74% had not received any such training.

²³⁹ Taking instructions from a 'group' in the native title context differs from taking instructions from a corporate client. Generally, companies have structures which regulate the process for instructing solicitors – that is, the role of communicating with solicitors is delegated to one member of the corporate group. Native title claimant groups – which tend to be based on kin or cultural relationships rather than corporate structures – do not generally have such processes in place and, often, meetings are held with an entire group (which may include dozens or even hundreds of people).

²⁴⁰ A further 22% indicated it was "of some importance".

²⁴¹ Eighty-one per cent of NTRB lawyers indicated it was a crucial aspect of their role and a further 19% believed it was "of some importance".

²⁴² 2004 Williams and Bauman Report, p 22.

These findings are consistent with the conclusion of the 2004 Williams and Bauman Report which notes that “[c]ross-cultural awareness and sensitivity on the part of all staff are central to their effectiveness, particularly in the quality of service delivered to applicants”. The report notes in particular the different expectations of lawyers and their clients as a potential source of misunderstanding or conflict.²⁴³

5. *Working in multi-disciplinary teams*

The working environment at NTRBs differs considerably from that of private law firms where the law generally stands as an easily definable area of practice. In the NTRB context, legal issues are intertwined with anthropological and cultural issues, thus, the work of NTRB lawyers is not always clearly distinct from that of non-legal staff. Fifty-seven per cent of NTRB lawyers saw it as imperative that lawyers be able to work efficiently and effectively within multi-disciplinary teams in order to deliver claimants with the best possible representation. Forty-five per cent of lawyers thought it crucial that new NTRB lawyers received training in co-operative multi-disciplinary team work, and 86% indicated that they had not received any training on this. This issue is raised in the 2004 Thurtell Report which found that “a substantial proportion of native title litigation has been characterised by experts, rather than counsel, playing the primary role in case construction and the presentation of the primary facts”.²⁴⁴ The report goes on to observe that this can “impact on the nature and quality of evidence gathered in native title cases”.²⁴⁵

The relationship between lawyers and anthropologists provides a useful example of this multi-disciplinary context. Communication among lawyers and anthropologists is widely regarded as crucial to the effective performance of an NTRB lawyer’s role. Interviewees indicated that the establishment or maintenance of good working relationships among lawyers and anthropologists is often impeded by lack of communication and a lack of understanding of the different disciplines and their associated imperatives. Some have suggested that it is a structural problem, with the work of anthropologists and the work of lawyers separated in ways that are not conducive to effective preparation of materials. Many others have commented that it is a matter of each profession better understanding the other’s discipline and approach.²⁴⁶

The Courts have a clear view that it is ultimately the lawyers who must retain responsibility for the conduct of cases. The issue was recently given prominence by Justice Sackville in the *Yulara* matter. His Honour expressed concern about the length and structure of the expert reports and said that this was “attributable, at least in part, to a failure to define [the expert’s] task with precision and due regard to the laws of evidence”.²⁴⁷

²⁴³ *Ibid*, p 11.

²⁴⁴ 2004 Thurtell Report, p 2.

²⁴⁵ *Ibid*.

²⁴⁶ See, for example, the 2004 Williams and Bauman Report which notes that “[l]egal practitioners often see that connection materials should provide a high degree of certainty, whereas many researchers see that such certainty is not possible due to the fluid nature of Aboriginal societies” (2004 Williams and Bauman Report, p 11). The report goes on to say that “[l]egal practitioners need an understanding of anthropological principles and practices to be able to carry out effective teamwork on applications” (2004 Williams and Bauman Report, p 22). See also 2004 Anthopos Report, p 41.

²⁴⁷ Ruling on Evidence, 3 August 2004, *Jango v Northern Territory (No.2)* [2004] FCA 1004, para 12.

His Honour went on to say that “it has been common for parties to rely upon discursive expert reports that have been prepared without assistance from lawyers and, therefore, with little regard to the requirements of the *Evidence Act*”.²⁴⁸ Justice Sackville expressed dissatisfaction with this approach, on the basis that:

- “this may answer the description of something that is a perfectly sensible piece of analysis from the point of view of the discipline of anthropology, [but is] not well adapted to the needs of litigation, in particular the requirements of the *Evidence Act*”,²⁴⁹ and
- it increases expense and difficulty.²⁵⁰

His Honour advised that “lawyers need to be involved not for the purpose of determining the substance of what the experts say but for the purpose of ensuring that what happens and what is produced complies with the requirements of the *Evidence Act* which are, after all, not merely technical but are designed to secure both procedural fairness and substantive justice in the conduct of proceedings”.²⁵¹ Justice Lindgren in the *Wongatha* matter had previously commented on the failure of lawyers, in the context of native title matters, to address the criteria of admissibility of expert opinion evidence.²⁵²

This is not only a recent issue, nor one confined to the NTRB context. Indeed in 1997, research showed that Australian lawyers in the profession generally were not making the best use of their expert witnesses.²⁵³ In a comment that is consistent with the types of observations made by non-legal consultants interviewed as part of this Project, one experienced witness is quoted as saying: “almost all the briefs I get – especially by young solicitors – are poorly prepared”.²⁵⁴ We are only aware of one subject for lawyers on expert evidence generally and none that deal with evidence in native title specifically. However, the Federal Court is in the process of preparing a seminar on expert evidence (to be run in June as part of the Native Title Conference), with the intention of exploring the different approaches being taken in native title matters.

It has also been noted that the processes involved in establishing connection to country “can place extraordinary pressures on communities”²⁵⁵ and, thus, it is particularly important that lawyers have the skills and the confidence to manage this aspect of their role appropriately.

²⁴⁸ *Ibid*, para 18.

²⁴⁹ Directions on *Jango v Northern Territory (No.2)*, 27 July, p 47.

²⁵⁰ Directions on *Jango v Northern Territory (No.2)*, 30 July, p 124.

²⁵¹ *Ibid*, p 113. See also Selway J in *Gumana v Northern Territory of Australia* (the ‘Blue Mud Bay’ matter) [2005] FCA 50, from para 152.

²⁵² *Harrington-Smith on behalf of the Wongatha People v State of Western Australia (No.7)* (2003) FCR 424, from p 427.

²⁵³ M Liverani, ‘Expert witnesses tell lawyers: Manage us better’ (1997) 35(7) *Law Society Journal*, p 50.

²⁵⁴ *Ibid*.

²⁵⁵ 2004 Williams and Bauman Report, pp 7 and 8.

6. *Familiarity with native title statutory scheme*

Over 70% of NTRB lawyers believed that familiarity with the complex legislative framework surrounding native title is a crucial aspect of their role.²⁵⁶ Almost the same number were of the opinion that training for lawyers new to the area is crucial, however, 74% had not received any training on the key legislation around which so much of their work revolves.

7. *Using plain English in an Indigenous community context*

The ability to effectively explain complex legal concepts in laypersons' terms, and to adapt these explanations to the claimants' context, was seen to be a crucial component of effective NTRB lawyering by 70% of lawyers.²⁵⁷ Part of the difficulty is that many native title concepts are inherently complex.

Sixty-three per cent also believed that such training for new lawyers coming into the area is crucial, while a further 33% indicated it was "of some importance". Almost three-quarters had received no training on this topic. Of the 26% who had received training, over a third felt the training was inadequate.

8. *Running meetings*

The task of running meetings involves identifying attendees, setting agendas, facilitating discussions and delivering presentations. As noted in the 2004 Williams and Bauman Report, the responsibilities of NTRBs to facilitate decision-making amongst clients has seen meetings, and the management of meetings, become "daily business" for NTRBs.²⁵⁸ Lawyers can find themselves having conflicting responsibilities during meetings. As reflected in the following figures, it is important for lawyers to be able to distinguish between the different roles they may be expected to perform and to understand the potential conflicts:

- 65% of NTRB lawyers felt that running meetings was a crucial component of their role²⁵⁹
- 56% believed that training on this for lawyers new to the area was crucial, and a further 33% believed it was "of some importance", and
- more lawyers received training on this topic than any other (47% of the 57 respondents), however, the vast majority (78%) felt the training they had received was inadequate.

9. *Familiarity with native title jurisprudence*

New native title jurisprudence continues to evolve, affecting the practice of NTRB lawyers. Sixty-five per cent of NTRB lawyers believed that familiarity with this jurisprudence is crucial to the effective representation of clients, and that training new lawyers in relevant case law is crucial. While 72% had not received any training on this, of those that had undertaken training, just over two-thirds were satisfied with what was provided. Given that most new NTRB lawyers do not have native title experience, ensuring lawyers are exposed to this jurisprudence is particularly important.

²⁵⁶ A further 26% thought it was "of some importance".

²⁵⁷ A further 28% thought it was "of some importance".

²⁵⁸ 2004 Williams and Bauman Report, p 12.

²⁵⁹ The remaining 35% thought it was "of some importance".

10. Assisting in resolving intra-community conflicts

Intra-community conflicts are commonly encountered by NTRB lawyers.²⁶⁰ The ability to assist in resolving intra- and inter-group conflicts was seen to be a crucial component of NTRB legal practice by 47% of lawyers. Fifty per cent believed that it was crucial to provide training in relation to this issue to new lawyers entering the area.²⁶¹ Sixty-six per cent had not received any training on this. Of the 34% who had received some training of this sort, 85% felt the training had been adequate.

11. Professional ethics involved in dealing with multi-person claimant groups

Sixty per cent of lawyers believed that this is a crucial aspect of practice (with a further 33% indicating it was “of some importance”) and 69% thought it crucial that new NTRB lawyers are trained in this area. Seventy-seven per cent of lawyers had not received any training on this issue.

12. Time management

Given the burdensome workload and problems of staffing referred to throughout this Report, time management skills are very valuable for NTRB lawyers. It is not surprising that a majority (58%) of NTRB lawyers believed this to be of crucial importance to their role. Fifty-one per cent believed that it is crucial for new lawyers to receive training in time management skills, yet 81% stated they had received no training on this.

13. Understanding relevant Federal Court and Tribunal roles, practices and procedures

NTRB lawyers’ responses on the importance of understanding the role, practices and procedures of the Federal Court and the Tribunal were similar. Almost 50% believed such an understanding in relation to the Federal Court was crucial, and 56% felt that training on this for new lawyers is crucial. Only 17% of NTRB lawyers had received such training.

Thirty-eight per cent believed an understanding of the Tribunal’s role and practices was crucial, and 47% felt that training for new NTRB lawyers on this is crucial. Three-quarters (74%) of NTRB lawyers had not received any training on this. A greater proportion of those who had received such training found it adequate in relation to the Tribunal (78%) as compared to the Federal Court (50%).

Further to the 13 aspects discussed above, the seven aspects listed below were considered to be of crucial importance to effective representation of claimants by between 40% and 49% of NTRB lawyers:

- strategic case management and other options and approaches on individual cases
- commercial and other negotiations
- familiarity with other statutory schemes (for example, cultural heritage and State-based land rights legislation)
- drafting court documents
- representing clients in mediation
- cross-cultural issues in the workplace, and
- drafting commercial agreements (see Table F38).

²⁶⁰ 2004 Williams and Bauman Report, p 12; 1999 Love-Rashid Report, p 48.

²⁶¹ The 2004 Williams and Bauman Report also notes the importance of this issue and recommends as an “urgent priority” the training of regionally based Indigenous mediators and facilitators (2004 Williams and Bauman Report, p ix).

The complexities relating to familiarity with other statutory schemes, and in particular in providing clients with clear information in relation to their options, were explained in some detail in the 2004 Williams and Bauman Report:

Applicants may be involved in a range of different agreement-making processes simultaneously. Some groups may be involved in arbitrated processes where decisions are imposed on them, while, at the same time, being involved in facilitative processes where they are directly negotiating and determining outcomes... These processes may involve different Indigenous groups or individuals, yet concern the same areas of land, giving rise to considerable confusion among those involved. The critical need is to communicate the differences between these processes, including what can be expected of these processes.²⁶²

Similar numbers believed training in these aspects is crucial for new lawyers coming into the area (see Table F40).²⁶³

The pattern of consistently low numbers of lawyers receiving training on the 13 aspects of NTRB legal practice outlined above is mirrored in relation to these seven aspects: in relation to some aspects as few as 6% had received any training, for other aspects the proportion ranged up to 25% (see Table F41).

In addition to being asked whether training on each aspect was important for new NTRB lawyers, those participating in the interview process were asked if training would be valuable for lawyers at their level of experience. Notably, considerable numbers of current lawyers indicated training in many of the aspects would be valuable for them personally, despite their experience, although this was not as high as the proportions indicated for new lawyers (see Table F39). This reflects the importance of formal training at all levels. It also reflects the complexity and continually evolving nature of NTRB work.

These findings are consistent with the types of training needs identified by other research and consultative processes focused on the functioning of NTRBs. For example, the 2004 Williams and Bauman Report identified cross-cultural training, teamwork and team-building skills and communication as “core training needs”.²⁶⁴ Lawyers were also asked to identify the skills they believed were the most difficult to master and their top priorities for training. These responses are presented in Tables E4 and E5 below.

²⁶² 2004 Williams and Bauman Report, p 7.

²⁶³ The notable exception is “strategising native title and other options and approaches on individual cases”. Forty-nine per cent of lawyers believed this to be a crucial aspect of their role but only 27% believed training new lawyers in this area was crucial.

²⁶⁴ 2004 Williams and Bauman Report, p 20. Recommendation 14 of that report urges OIPC to identify the resources required for the development of localised cross-cultural training and the trialling and evaluation of pilots in these training programs.

Table E4: Skills or aspects of an NTRB lawyer’s role that are the most difficult to master, as identified by NTRB lawyers

Most difficult skills to master	Number of responses ²⁶⁵
Cross-cultural understanding	18
Communication	16
Technical legal concepts	17
Negotiation	7
Mediation	7
Taking instructions	4
Drafting	3
Other	14

Source: Consultations

Table E5: Top priorities for formal training and professional development, as identified by NTRB lawyers

Priorities for training	Number of responses ²⁶⁶
Negotiation	15
Native Title Act	14
Commercial law	12
Cross-cultural communication	10
Litigation processes	9
Communication	8
Native title jurisprudence	8
Drafting	7
Organisational and management issues	7
Broader professional development	6
Mining law	6
Environmental law	3
Trusts	2
Accountability to funding bodies	1
Other	12

Source: Consultations

Existing training

The training that has been undertaken by NTRB lawyers includes:

- internal NTRB training
- Tribunal workshops (focused on such issues as ILUAs, PBCs, the ‘bundle of rights’ concept, the registration test and future act matters)
- State government workshops
- Law Society seminars, workshops and courses
- ATSiS courses (on administrative law and governance, contract law, and contracting procedure and management)

²⁶⁵ Thirty-three current NTRB lawyers and six former NTRB lawyers responded to this question.

²⁶⁶ Forty-eight current NTRB lawyers responded to this question.

- mediation courses (through institutions such as LEADR, Leo Cussens and Bond University)
- seminars run through private law firms
- mining law courses
- University of Western Australia short courses (on mining, native title and anthropology), and
- presentations by speakers from other NTRBs (see Table F43).

Additionally, the annual native title conference was cited by many NTRB lawyers as a form of training. However, many respondents saw the annual native title conferences as more useful for networking. That is, opportunities for communication with, and developing relationships among, NTRB lawyers were considered by many to be more valuable than the presentation sessions at the conferences (see Table F44).

It is clear that training is needed and sought after by NTRB lawyers, yet only limited training is available. Of those who have undertaken some form of relevant training, 63% thought it was valuable (see Table F45). Yet, the training that is available is often peripheral to the day-to-day work of NTRB lawyers. There are very few courses, programs or seminars targeted at NTRB lawyers and tailored to their particular needs. A similar discussion is currently underway in another discipline, with the 2004 Anthropos Report noting that the availability of native title training for anthropologists is also a vexed issue.²⁶⁷

A number of universities list native title subjects as part of post-graduate law programs, including: Australian National University, Monash University, Murdoch University, Queensland University of Technology, University of Adelaide, University of Melbourne and University of New South Wales. However, the University of Melbourne Native Title Law and Practice course is the only one that appears to run on an annual basis. The week-long course is pitched at the national level and is run on-campus in Melbourne. It is primarily targeted at professionals working in the native title field but it is not directed specifically at lawyers or the NTRB context.²⁶⁸ During consultations we were not advised of any NTRB lawyers who have participated in the course, however, the course coordinators believe there has been at least one over the years²⁶⁹ and are expecting several to be involved this year. Cost and work commitments appear to be major factors affecting participation by NTRB lawyers.

²⁶⁷ 2004 Anthropos Report, p 37.

²⁶⁸ The intensive week-long course is presented in relays by a panel of expert contributors. Extensive written materials are also supplied. The course provides a comprehensive coverage of the common law, legislation (native title, land rights, cultural heritage) and leading court decisions, all as a background to current practical issues concerning principles, processes and outcomes. The course involves sessions on anthropological and cultural heritage issues and on the roles and practical operations of the Federal Court, the Tribunal, NTRBs and PBCs. Some emphasis is placed upon the issues confronting NTRBs generally, including their lawyers and anthropologists.

The course is designed primarily for lawyers taking post-graduate degrees or diplomas, but also seeks to be useful to non-lawyers from a variety of professional backgrounds and occupations (including government, industry (especially the natural resources sector) and the Tribunal). The split of participants has generally been approximately two-thirds lawyers and one-third others (Native Title Law and Practice course coordinators, personal communication, March 2005).

²⁶⁹ The course coordinators advise that over the ten years the course has been running, there have also been a few participants who subsequently went on to become NTRB lawyers.

Preferred training format

NTRB lawyers preferred group-based workshops to other training formats (namely lectures, individually by correspondence and web-based training). Intensive courses are preferred by a greater number than ongoing sessions (see Tables F46 and F47). However, issues were raised about the difficulties in taking time out of hectic schedules to attend any type of course and in committing to dates in the future when claimant group meetings or court hearings may have to be scheduled. A way to address this is suggested as part of the proposal below.

Proposal

There is a need for highly targeted and appropriately delivered training for NTRB lawyers. To date, lack of resources and difficulties associated with committing to certain dates have prevented this from being addressed. More generally, the frenetic environment of NTRBs often means that matters such as training are not able to be prioritised. Accordingly, outside assistance is required to ensure these needs are met.

Although there is clearly a cost involved in developing and delivering training programs, this investment will achieve savings in the longer term as retention rates rise and expertise is enhanced, leading to faster and more successful resolution of matters. The value of training is maximised if it is structured as an investment not only in the individual but in the organisation itself. As noted in the 2004 Williams and Bauman Report, “[a]ny approach to training needs to be integrated in such a way as to ensure that it builds both individual and corporate knowledge and expertise”.²⁷⁰

It is recommended that a training program tailored to NTRB lawyers be developed and made available to NTRB lawyers. Such a program should:

- emphasise skills-based learning relevant to native title in areas such as advocacy, diplomacy, drafting, conducting effective meetings, conflict management, cross-cultural communication, inter-disciplinary communication (particularly focusing on an understanding of anthropology), interviewing, mediation, the use of plain English, report writing, Federal Court practice and procedure, and other training topics covered above
- provide targeted sessions on the aspects of various areas of law (such as property law, commercial law, trusts, contracts, tax, administrative law and constitutional law) relevant to native title matters, and
- include content on relevant State (and Territory) law and policy, legal ethics issues (such as conflict of interest) and emerging issues in native title.

As with the development of an appropriate induction program (see Strategy 5 above), input from each NTRB on regional and local cultural factors will have to be incorporated into the ongoing training program. Moreover, the program will have to include sessions that assist lawyers to understand their clients’ broader aspirations and the relevant legal avenues to achieve these.

Programs should be delivered to NTRB lawyers on an outreach basis (that is, held at or near to NTRB offices) to minimise costs and maximise relationship-building opportunities for participants. Alternative modes of delivery such as through DVDs or video tapes may

²⁷⁰ 2004 Williams and Bauman Report, p 31.

be appropriate as supplementary materials but the importance of face-to-face contact should not be under-estimated. Direct experience maximises participants' engagement and provides one way of addressing issues of isolation and alienation for those lawyers located in more remote settings or in small-sized NTRBs. Courses should also be designed to ensure 'two-way' learning, with participants able to raise current issues and suggest approaches.

We propose that the courses be designed using an intensive format, to minimise disruption to normal work schedules, minimise travel expenses and maximise opportunities for relationship building among NTRB lawyers. While different courses should be developed for lawyers of different levels of experience, as is standard in private legal practice, some workshops should be designed to be general in nature. This format lends itself to an annual training scheme, in which all participants would attend in the same week at the one location. The few sessions open to all lawyers would enable younger lawyers in particular to gain the benefit of shared discussions with more experienced lawyers.

All sessions should be able to be credited towards lawyers' mandatory continuing legal education requirements²⁷¹ – several interviewees commented on the value of accreditation to lawyers' sense of achievement as well as for their career development. This is reflected in the following quote from one NTRB lawyer: "In any other area you get accreditation for being a specialist. Here there is no CLE and no accreditations for native title lawyers' skills. That is a gap that needs to be filled". The frequency – and indeed content – of courses should be dictated by the needs of NTRB lawyers. It is expected that running the key components of all courses on a two-year cycle would be the most appropriate.

To assist lawyers in attending training, other relevant stakeholders ought to be advised of the dates of the training week and arrangements could be made with these bodies to ensure conferences, meetings, hearings and other claim-related events are not scheduled during these periods. Given it is in the interests of all stakeholders (the Federal Court, the Tribunal, government parties, industry bodies and others) that NTRB lawyers receive training, and given the relative flexibility of timeframes and deadlines in the native title context, it is expected that this would be widely supported.

Implementation

Establishing an ongoing training program will involve the following:

- preparing content of training sessions and materials
- delivering training sessions, and
- administering participation of NTRB lawyers in training.

The training should be developed and delivered by both academics and practitioners with strong research and practical backgrounds in native title law and practice. Travel, accommodation and meal costs for the presenters will have to be budgeted for, as will similar costs for NTRB participants. The proposed human resources manager (see Strategy 3) ideally would have responsibility for arranging timing of the courses and attendance of NTRB participants.

²⁷¹ Under the professional conduct and practice rules of each state's law society, which bind all legal practitioners in the relevant state, practitioners are required to undertake continuing legal education (CLE). This does not apply in the Northern Territory. There are certain criteria that the course or program of education must meet to satisfy the CLE requirement.

Alternative options for the preparation and delivery of the course include:

- development and delivery of a targeted NTRB training course by the coordinators of existing native title courses such as offered at Melbourne University, the Australian National University or the University of New South Wales
- development and delivery of a targeted and comprehensive NTRB training course by the Tribunal's legal unit, and
- expansion of the Tribunal's training program which currently focuses on specific issues such as future acts, ILUAs and PBCs.

3.2.3 Strategy 7: Scholarships for further study to enhance skills

NTRB lawyers expressed a need for training in relation to numerous issues and topics. Many of these issues are specific to the native title context but there are also others that are common to the profession generally and are already the subject of additional training or external studies for lawyers.

Proposal

As a supplement to the induction and ongoing training strategies proposed earlier in this Section, it is recommended that opportunities for post-graduate study in areas such as mining law and practice, mediation and negotiation, environmental law and advocacy be made available to experienced and committed NTRB lawyers.

Such opportunities would not only provide individual lawyer with valuable knowledge and skills, but would benefit their NTRB, their colleagues and clients through the application and transfer of skills learned. The system as a whole could further profit by lawyers becoming subject-specific advisers across NTRBs – for example, those completing a Masters in mining law may be utilised system-wide to advise on best practice approaches to mining negotiations. More generally, the scheme would contribute to increasing retention rates, not only because of the improved skills and confidence in their capabilities that such training would provide, but also because professionals are increasingly interested in employment arrangements offering individual professional development opportunities.

These study opportunities would probably be available only to a limited number of NTRB lawyers. The suggested approach to overcome the cost barrier is to have the scheme funded in part externally. In particular, given that the proper functioning of NTRBs advances not only Indigenous interests but also industry and corporate development objectives, industry stakeholders should be approached to support NTRBs in providing these professional development opportunities to NTRB lawyers. Particular industry sectors should be approached in relation to training relevant to their sector (see next section, Pilot Program). The 2004 Williams and Bauman Report recognised the need for this sort of training, noting that “[i]n order to negotiate appropriately with different types of industries, including the minerals and pastoral industries, legal practitioners must also have a clear understanding of the commercial and economic matters relevant to those industries”²⁷².

As an additional aspect of this strategy, we suggest that consideration also be given to the creation of a sabbatical program for NTRB lawyers, enabling lawyers to research or study in an area of professional relevance. A significant number of interviewees believed this would be valuable in increasing the retention of NTRB lawyers (see Table F17). This would have benefits in terms of professional development and the fostering of links with academic institutions, as well as through helping to reduce ‘burn-out’ and early resignations. Options for involving lawyers enrolled in such a program in the development of NTRB lawyers’ training courses (see Strategies 5 and 6) should also be explored.

²⁷² 2004 Williams and Bauman Report, p 22.

Pilot program

The feasibility of such a scholarship program has been evaluated. Rio Tinto has generously provided funding for scholarships for two NTRB lawyers to study a one-year Masters in International Mining Law and Policy at the University of Dundee in Scotland. The scholarships are now underway; further details on the pilot program are provided in Appendix 8.

Implementation

Establishing an NTRB scholarship scheme would involve the following:

- identification of appropriate courses
- identification of and negotiation with potential sources of funding
- design and advertisement of application process
- administering the selection process, and
- monitoring of students' progress.

These tasks would fall within the responsibilities of the human resources manager referred to in Strategy 3. Alternatively, these organisational aspects can be performed by a consultant engaged to administer the process on a part-time basis over a short period.

The other aspect of the budget for this strategy is the course fees and associated student allowances. These will obviously vary depending on the type and location of the course. By way of an indicative cost, the scholarship for the Masters in International Mining Law and Policy course at the University of Dundee in Scotland is valued at approximately \$55,000 per student.

3.2.4 Strategy 8: Secondments to commercial law firms

Most interviewees strongly believe that experience in commercial law matters is valuable in the native title context, given:

- the commercial nature of many native title matters
- the negotiation role often undertaken by NTRB lawyers
- the practice management requirements of NTRB work, for example, file management and time management
- the project management role often undertaken by NTRB lawyers, and
- the need for legal and commercial networks to support legal practice.

In particular, many interviewees believed that experience in commercial legal practice provides a good grounding for developing skills such as file and time management skills, understanding court processes, conducting research and legal ethics around taking instructions. These skills are widely seen to be important in the role of an NTRB lawyer, yet many interviewees have commented that the NTRB environment is usually not the best place to develop these skills due to organisational constraints and individual workload pressures.

Proposal

We suggest that secondment opportunities for junior NTRB lawyers to commercial law firms, of six to twelve months duration, be pursued to assist in the development of relevant skills and otherwise build relationships among NTRBs and the private law sector. Other strategies for building relationships with the private law sector are discussed under Strategy 13 below.

As noted above in Strategy 6, understanding the role and processes of the Federal Court and the Tribunal is also considered by many to be important. Accordingly, it is also recommended that consideration be given to the idea of similar secondment arrangements being pursued with the Federal Court and the Tribunal.

Implementation

Establishing a secondment scheme will involve the following:

- identification of, and negotiation with, appropriate law firms
- administering the placement process, and
- monitoring of the relationships with law firms and performance of NTRB lawyers.

These tasks would fall within the responsibilities of the human resources manager referred to in Strategy 3. Alternatively, these organisational aspects can be performed by a consultant engaged to administer the process on a part-time basis over a defined period.

3.2.5 Strategy 9: Management training for NTRB lawyers

In addition to training and support with respect to legal functions, it is widely considered that management training for those lawyers elevated to management positions or for those lawyers with some managerial responsibilities would be valuable. In the type of frenetic environment that often exists in NTRBs, good management skills are particularly valuable.

As with any worker, the ability of lawyers to perform their functions effectively is contingent upon the existence of good management structures. It is, therefore, essential that NTRB management have the skills to facilitate such a structure and to deal with complexities facing their organisations. Leadership skills and the ability to provide mentoring-type support to their staff is also critical. Both this strategy and Strategy 15 below (focusing on NTRB non-legal managers) seek to provide opportunities for developing these skills in the NTRB system.

None of the principal legal officers interviewed have a management background or have undertaken formal management training; almost all indicated that they would be interested in undertaking, and would benefit from, management training.

Proposal

We recommend that opportunities for management training be made available to NTRB principal legal officers and other senior lawyers whose roles include management responsibilities. It is recommended that the training offered be of a general nature, and, therefore, a specific course will not be required. However, a follow-up session which addresses NTRB-specific management issues and skills should also be provided.

Implementation

Arranging management training for NTRB lawyers will involve the following:

- identification of appropriate courses
- engagement of professionals with experience in the NTRB field to deliver short follow-up sessions to groups of at least five NTRB lawyers who have undertaken management training, and
- monitoring of benefits of the training.

These tasks would fall within the responsibilities of the human resources manager referred to in Strategy 3. Alternatively, these organisational aspects can be performed by a consultant engaged to administer the process on a part-time basis over a defined period.

3.2.6 Strategy 10: Performance evaluation

Very few NTRBs have any formal systems in place for evaluating the performance of their lawyers. While informal performance evaluations (for example, through positive verbal feedback from managers during the course of a regular feedback session) may be sufficient to some extent, particularly in smaller organisations, more formalised approaches are valuable in ensuring that the professional development needs of NTRB lawyers are identified and addressed. It is usual in legal practice to have formal performance evaluations.

Proposal

It is recommended that criteria for identifying the development needs of NTRB lawyers be prepared for NTRBs and provided to each for their consideration. The NTRB human resources manager (see Strategy 3) should assist in this process.

While in many private law firms performance evaluation tools may be utilised primarily as a 'weeding out' device, in the NTRB context (where recruitment is difficult) their function is to make the most of the resources and skills already available within the system – they should be seen, and applied, as mechanisms for better supporting NTRB lawyers and assisting them in their professional development.

In developing a suitable model for the NTRB system, much will be gained from examining the type of performance evaluation criteria currently used in private legal practice as well as service delivery organisations similar to NTRBs (for example, community legal centres).

Implementation

Implementing valuable performance evaluation systems will involve the following:

- developing draft criteria
- considering models used in private law firms and other service delivery organisations
- running workshops on draft criteria with NTRB management (including senior lawyers), and
- developing implementation plans.

These tasks would fall within the responsibility of the human resources manager referred to in Strategy 3. Alternatively, a consultant could be engaged to carry out these functions over an extended period.

3.2.7 Strategy 11: Native title conference

While resource and time pressures mean that frequent meetings of NTRB lawyers cannot occur, the majority of NTRB lawyers attend the annual native title conference, making it a valuable opportunity for transferring knowledge and skills, and developing relationships with other NTRB lawyers.²⁷³

The NTRB lawyers interviewed (and other interviewees) were almost unanimous in their support of the annual conferences (see Table F44). More lawyers responded that it was valuable for the opportunity it provided to meet other NTRB lawyers with whom they could discuss their experiences and challenges, than those who valued it for its content (see Table F44). For example, one lawyer commented:

When I first started I loved it [the native title conference] because of the sense of being in a big group of similarly minded people. It also provided opportunity for de facto mentoring. Now I've become more experienced, I don't find them particularly useful, apart from the networking aspects. Few papers are challenging or contain new ideas.

Given the number of unresolved legal matters and operational issues that NTRBs are struggling to deal with, efforts need to be made to strengthen the value of the existing annual conference. This will involve better targeting of the legal content of the sessions.

Due to the large numbers that attend, the annual conference provides an ideal opportunity for in-depth and highly targeted discussions on relevant topics. More effort should be put into enhancing this substantive aspect of the conferences (as distinct from the important relationship-building aspect).

All NTRB lawyers spoke positively about the 'NTRB only' day before the formal start of the conference. However, comments were made such as:

- the NTRB-only session should be longer
- there should be an agenda, developed with NTRB input
- the format should be more formal, and
- it should provide an opportunity for NTRBs to talk openly and in detail about issues facing them, and to develop strategies to address these.

For example, a session for lawyers and cross-cultural experts to discuss ways of explaining various difficult native title concepts to clients was frequently suggested during the consultation process.

Thus, enhancing the value of the conferences for NTRB lawyers may also involve running more NTRB-only sessions – in addition to interviewees in this Project, others have commented that the utility of the conference for NTRBs and claimant groups is constrained by the diversity of attendees and presenters.²⁷⁴

²⁷³ Over 85% of NTRB lawyers indicated that they had attended at least one native title conference (see Table F44).

²⁷⁴ For example, Noel Pearson expressed concerns about the attendance of respondent parties at the annual conference: Pearson N, 2003 Mabo Lecture, p 2.

Proposal

It is accordingly recommended that NTRB managers and senior lawyers be given the opportunity and support to contribute to the development of the agenda for future native title conferences.

Implementation

Enhancing the value of the annual native title conference for NTRB lawyers will involve the following:

- identifying issues of significance to NTRB lawyers (operational as well as legal)
- developing agenda items around these issues, and
- liaising with AIATSIS and OIPC.

A three-member working group made up of NTRB management (including principal legal officers and non-legal managers) should be formed to oversee the development of these aspects. The human resources manager referred to in Strategy 3 will need to be involved to assist with coordination of the group and its tasks.

3.3 Improving support structures for NTRB lawyers

3.3.1 Strategy 12: NTRB information service

There is a real need for greater communication among NTRBs. Lack of communication among NTRB lawyers across the system was believed by 51% of them to be inhibiting effective client representation and 77% felt there was not enough communication among NTRBs (see Table F6 and Table F48). (Perhaps more surprising was that 38% of lawyers believed that the level of communication among lawyers within the one NTRB was inhibiting effective client representation – see Table F6). The problems arising from lack of communication manifest in duplication, inconsistent advice and approaches and sub-optimal legal practice. Lack of communication also leads to feelings of isolation that can result in early resignations and loss of corporate knowledge. In addition, all of these issues have cost implications.

Knowledge sharing

Many of the lawyers interviewed believe that better sharing and effective utilisation of existing expertise would be valuable for overcoming some of the problems caused by the current lack of communication. Particularly at the more junior levels, there is an interest in greater communication and the sharing of experiences, ideas and information among NTRBs. This is complemented by a widespread willingness to share such information and experiences. Lawyers have found opportunities such as the annual native title conference valuable in this regard but it is evident that more is needed to foster the desired relationships (see Table F49). One lawyer commented, “We need some ways of allowing us to work together in some way. I often think I must be reinventing the wheel when preparing documents... it would be great to have some way to find out if someone else has done it before, then be able to catch them to talk about it”.

Access to resources

Many of the lawyers interviewed find it difficult to keep abreast of relevant developments in the law. Tools to assist with this are widely sought. In particular, NTRB lawyers expressed a need for timely access to resources that are sufficiently detailed and targeted.

Half of the NTRB lawyers interviewed agreed that limited access to resources inhibited the ability of lawyers in the system to effectively represent their clients (see Table F6). Table F50 presents lawyers’ responses to questions about the adequacy of their access to specific materials.

NTRB lawyers responded that they most commonly rely on journals and newsletters, discussion with internal colleagues, the Tribunal’s ‘Alert Service’ and the internet (see Table F51).²⁷⁵ Overwhelmingly, the various materials prepared and published by the Tribunal were those most commonly accessed journals and newsletters. Other publications referred to include the Indigenous Law Bulletin, various AIATSIS publications,

²⁷⁵ Twenty-two NTRB lawyers mentioned the use of journals and newsletters, 19 mentioned discussion with internal colleagues, 15 mentioned the NNTT Alert Service and 14 referred to the internet. Other sources of information that were mentioned by NTRB lawyers included discussion with other NTRBs (ten), internal library (eight), emails from internal colleagues (four), emails from non-NTRB contacts (four) and discussion with non-NTRB contacts (three).

the Alternative Law Journal, the Australian Indigenous Law Reporter and the Australian Mining Law Journal (see Table F52).

The internet sites that were by far most commonly utilised by NTRB lawyers are the Tribunal website,²⁷⁶ AustLII²⁷⁷ and the Federal Court website.²⁷⁸ Other internet sites mentioned by NTRB lawyers included:

- various State government departments
- ScalePlus
- AIATSIS
- general search engines (including Google)
- various Commonwealth Government departments
- ATNS.net
- LexisNexis
- mining company websites
- NTRB.net, and
- State law societies/institutes (see Table F53).

While the Federal Court's Native Title Infobase was not active until the end of 2004 (accordingly very few of those consulted had made use of it or even seen it), the Project Team's research suggests it will be a valuable resource for NTRB lawyers. However, as with other websites, it provides access only to already existing materials and is not specifically targeted towards NTRB lawyers' needs.

Proposal

In response to the needs described above, the Project Team initially developed a proposal for the creation of a website providing access to the following:

- an internal NTRB lawyers communication database
- fast access to research materials prepared specifically for use by NTRB lawyers (for example, an index of the particular native title rights and interests accepted by the Federal Court and an index of model agreement clauses searchable by subject matter of clause)
- on-line discussion of legal issues and research needs, and
- a gateway to other relevant databases and websites (including those containing legal information, research materials and training resources).

The aims of a targeted information service of this kind are to:

- increase efficiency in the conduct of NTRB legal research functions
- reduce duplication (and associated costs) in the compilation and distribution of research materials
- improve communication among NTRBs, and
- improve standards of legal analysis, advocacy and negotiation in native title matters.

During the consultation process, we sought feedback from interview participants on this proposal. The vast majority (88%) responded positively to the idea. The types of

²⁷⁶ Forty-three lawyers indicated they used the Tribunal website in the context of their NTRB legal work.

²⁷⁷ Forty-one lawyers indicated they used the AustLII website.

²⁷⁸ Eighteen lawyers indicated they used the Federal Court website.

comments that accompanied these responses generally referred to the value of having all relevant information located in one place and the benefits of having this information categorised and searchable at an advanced level (see Tables F54 and F55). In the words of one NTRB lawyer: “The primary thing that I think would provide a huge difference in workload and stress levels is the availability of information and precedents, whether by way of NTRB information exchange or preferably by way of a central agency...”.

As noted above, many different websites are used frequently by NTRB lawyers, however, none provide the ‘one stop shop’ service that this proposal envisages. This feature is attractive to NTRB lawyers, as the substantial positive feedback on the proposal demonstrates. More specifically, the most popular aspects of the proposed website were:

- searchable directory of NTRB lawyers
- template agreements
- court document precedents, and
- case summaries and commentary.

In response to this feedback, the initial proposal has been further developed into an NTRB-dedicated web-based information service. Detail on the proposed content and structure of the three main features of this service follows.

a. NTRB lawyers’ communications network

A service that allows NTRB lawyers to search electronically for others in the system on the basis of their expertise is recommended. This service would comprise a database with advanced search capabilities, containing key professional biographical details of NTRB lawyers. The types of search criteria which NTRB lawyers have suggested would be valuable include:

- matters (involvement in)
- judges (appearances before)
- agreements (worked on)
- mining companies (negotiated with)
- State government departments (negotiated with)
- area of practice/expertise (for example, mining, petroleum or fishing)
- law firms/lawyers (worked with)
- consultants (worked with, for example, anthropologists and historians), and
- NTRBs (worked at).

The following two examples seek to illustrate how the various search criteria and the database generally can be used.

Example 1: Lawyer X is instructed to explore joint management arrangements as part of a deal being negotiated on behalf of a native title claimant group. X could use the database to search for other NTRB lawyers who have previously represented or advised clients in relation to joint management arrangements and make contact as appropriate.

Example 2: Lawyer Y has discovered she is to appear before a Federal Court judge whom she has not appeared before previously and is not familiar with. Y could use the communication database to search for and then contact other NTRB lawyers who have appeared before this judge.

Through increased sharing and exchange of ideas and information among NTRB lawyers, it is expected that such a tool would:

- maximise the use of existing knowledge
- mitigate against loss of corporate knowledge, and
- facilitate development of mentoring relationships and leadership opportunities.

This database would be available on a website accessible only to current NTRB lawyers (and possibly managers). The website should also have a limited public access section where information about NTRBs' current activities, issues and achievements can be posted, as well as general news including, for example, a 'positions vacant' section.

To be of value, the database would have to be regularly updated to ensure only current information is available. This would require significant cooperation from NTRB lawyers. Given that almost 90% of NTRB lawyers indicated that they would be happy for their names and brief career details to be included in such a database, it is expected that the necessary input would be forthcoming (see Table F56).

Additionally, and as an alternative to this task being performed by the human resources manager suggested in Strategy 3, it is recommended that one of the persons involved in running the website be responsible for coordinating regular meetings amongst senior NTRB lawyers. The purpose of the meetings would be to facilitate discussion generally as well as ensure feedback on the content and operation of the website.

b. Precedents database

During the consultation process, NTRB lawyers repeatedly called for better access to legal materials such as precedents, model agreements and legal analysis that is sufficiently sophisticated and specifically designed for their use. Examples include an index of the rights and interests accepted by the courts as comprising native title rights and interests, and a list of 'typical' benefits and provisions contained in commercial mining and other land development agreements.

A searchable database containing precedents for agreements, court submissions and forms could provide this access in an efficient and systemised way. Under this strategy, the database would be accessible on the same website as the communications database, and would similarly be accessible only to current NTRB lawyers. Materials on the database would be collated by a small team with information technology as well as native title experience and skills. This team would be responsible for updating and maintaining the content of the database, as well as monitoring useability and improving search functions as necessary.

As with the communications database, considerable assistance from NTRBs would be required at the information collation stage. Agreements with other bodies such as the Federal Court, the Tribunal and governments would also be pursued in relation to sharing of documents on a confidential basis.

c. Circulation of relevant advice and analytical material

We recommend that, in addition to administering the precedent and communication databases, the team also circulate relevant advice and other analytical material on a regular basis to all NTRB lawyers. This service would address the need for better access

to comprehensive and targeted analysis of case law developments, agreements and other related issues.

Currently, the dissemination of various information materials occurs on a casual basis within the NTRB system – often it is a matter of ‘who you know’ that determines whether a given lawyer is on another’s informal mailing list. Clearly this is not ideal, particularly for the many new lawyers entering the system with few or no contacts in other NTRBs. The annual native title conferences also often generate activity in terms of sharing of materials across NTRBs, however, this is generally not long sustained once NTRB lawyers return to the reality of their workloads. There is, therefore, a need for a strategy to help maintain that initial enthusiasm and facilitate communication and the sharing of materials and advice.

Fulfilling this role would require the team to liaise primarily with NTRBs, but also with other bodies (such as the Federal Court, the Tribunal, AIATSIS, external contractors and legal consultants) that may, from time to time, prepare materials of interest to NTRBs. Ensuring materials disseminated are suitably ‘sanitised’ to avoid confidentiality concerns will also be critical.

Specific consultation will also be required to clarify details concerning the appropriate processes and principles for determining which materials are to be distributed. A fundamental principle would be that such decision-making is driven by NTRB needs. These processes will have to ensure the information disseminated is not excessive in content or frequency.

Implementation

Establishing an information service of this type will require IT expertise utilising off-the-shelf software to create a web-based environment that provides:

- access to a diverse range of on-line applications
- on-line collaboration among registered users
- aggregation of content for efficient sharing, and
- personalisation of the experience of using the service to suit the individual.

This could be installed and configured within an existing website such as ‘NTRB.net’ or a new website could be created. Such a site could be fully externally hosted; alternatively it could be established and administered through a large private or public organisation with considerable IT resources (for example, a large law firm or a university). Examples of the type of software required are Microsoft Sharepoint, Plumtree and Websphere. Specialised providers can deliver these functions as a managed service so no hardware is required.

Specialists with IT and native title backgrounds would need to be involved to ensure appropriate configuration, content, maintenance and user support. Among their duties would be responsibility for maintaining content on the publicly-accessible section of the site. This would involve liaison with the proposed human resources manager (see Strategy 3), particularly in relation to maintaining content relevant to recruitment.

The website would be a secure site available only to registered users. This would also allow for content agreements to be made with commercial information databases for business to business deals that allow federated searches and aggregation of results.

The budget for this service would include costs for software licensing, design consulting, software configuration, initial population of site with content and development of mini-server-side applications. Installation, configuration and content upload could be completed within three months. A further nine months should be allowed for full implementation.

3.3.2 Strategy 13: Building relationships with law firms

Support from external bodies has always been critical to the operation of NTRBs. Expansion of the types of external support available would further benefit NTRBs, particularly if such support involves not only the provision of advice on a specific matter, but also involves the transfer of skills to NTRBs.

In particular, commercial law firms should be encouraged to expand the types of assistance traditionally provided to NTRBs. Suggested options are as follows:

- providing legal advice on particular matters through:
 - secondments of commercial lawyers to NTRBs for a particular project or matter (for example, for the purpose of establishing appropriate post-determination title-holding structures)
 - preparation of precedents, and
 - running workshops for NTRB staff
- mentoring of NTRB lawyers (either through relationships between individuals at law firms and NTRBs, or through organisational arrangements between particular law firms and particular NTRBs)
- providing access to their resources and advice on non-native title matters
- secondments to law firms from NTRBs (see Strategy 8 above)²⁷⁹
- allowing NTRB lawyers to participate in their continuing legal education programs, and
- seconding, or otherwise providing NTRBs with access to, their file management and other corporate systems experts.²⁸⁰

Recently, the Cape York Land Council and law firm Gilbert + Tobin agreed on one of these types of arrangements. For three months from April 2005, Gilbert + Tobin will provide a lawyer to work within Cape York on a secondment arrangement. During the secondment, Gilbert + Tobin will maintain the lawyer's salary and Cape York will meet the lawyer's travel and accommodation expenses. While the lawyer will be supervised on a daily basis by the principal legal officer from Cape York Land Council, a partner and a special counsel from Gilbert + Tobin will also be available to the seconded lawyer as 'home base' mentors during the secondment.

In addition to providing expertise on particular issues, secondments of commercial lawyers to NTRBs will also have benefits in terms of facilitating access to practical experience, mentoring opportunities and potential recruits. A further benefit of the establishment of the types of arrangements and relationships suggested above is the greater awareness private firms will develop of the diverse legal practice areas relevant to NTRB work, and greater appreciation for the skills of NTRB lawyers.

²⁷⁹ Although there is clearly overlap between Strategies 8 and 14, they are separated on the basis that Strategy 8 is primarily focused on building the skills of NTRB lawyers through secondment opportunities, whereas the purpose of Strategy 13 is to improve the support structures for NTRB lawyers.

²⁸⁰ This suggestion is included in response to numerous comments made by interviewees about the difficulties caused by the lack of appropriate office systems in NTRBs.

NTRB lawyers widely support many of these suggestions (see Table F57).²⁸¹ Furthermore, we have made initial approaches to selected law firms in relation to these suggestions and there appears to be some interest. It is recognised that potential conflicts of interest and confidentiality issues may arise that will need to be managed.

Proposal

We recommend that selected law firms be approached with information about the types of assistance they could provide to NTRBs. Partnership arrangements between individual law firms and NTRBs should be considered, whereby various forms of assistance are provided by one firm to one NTRB, rather than to a number of NTRBs.

Various government ministers and members of the judiciary should be approached to encourage law firms to build relationships with NTRBs.

Implementation

A general presentation on the types of assistance NTRB lawyers are in need of should be prepared by the human resources manager referred to in Strategy 3, or by a consultant engaged on a short-term contract. In addition to a generic presentation, particular examples of actual legal questions or resource needs should be communicated to such firms as appropriate.

Promotion to the legal sector of the benefits of such relationships, as well as coordination of arrangements already put in place, will be ongoing tasks.

²⁸¹ At least 21 lawyers stated that the suggested forms of assistance would be either valuable or very valuable. In particular, 37 lawyers were of the opinion that provision of legal advice on particular matters would be valuable or very valuable and 30 were of this opinion in relation to secondments of commercial lawyers to NTRBs for a particular project or matter.

3.3.3 Strategy 14: Mentoring and alumni network

Mentoring is increasingly becoming an important component of professional development programs, and alumni often fill the role of mentors well. This section looks at the relevance of mentoring programs and alumni networks in the NTRB context.

Almost 60% of NTRB lawyers felt that lack of access to professional support and advice was a factor inhibiting effective client representation in the NTRB system generally (see Table F6).²⁸² This is reflected on a more personal level through the finding that while almost 85% of NTRB lawyers²⁸³ felt that they needed a mentor, less than 40% indicated having one (see Table F58).

Difficulties in gaining access to support from supervisors are exacerbated by heavy workloads and travel demands. Furthermore, several lawyers specifically commented that principal legal officers should not have their own caseloads as this meant they often became unavailable to fulfil their staff management and supervisory responsibilities.

On the issue of access to a network of NTRB alumni comprised of former NTRB lawyers:

- the great majority (over 79%) of NTRB lawyers indicated that such access would provide them with valuable support
- 86% indicated that they would be willing to stay involved in the field as part of such a network if they were to leave their organisation, and
- 57% of former NTRB lawyers expressed their willingness to become involved again in the field via such a network (see Tables F59 and F60).

The consensus among all respondents was that relevant knowledge and expertise is held by those currently working within the system, coupled with acknowledgement of frequent loss of experienced lawyers, renders these results particularly significant.

Other ways of maintaining involvement in the NTRB system upon ceasing employment suggested by interviewees included:

- returning to an NTRB for one week per year
- giving advice on a needs basis
- promoting the field to university students
- running workshops for NTRB lawyers, and
- contributing in a voluntary capacity to the proposed NTRB web-based information service.

²⁸² The avenues of professional support currently being accessed by NTRB lawyers are explained in the following interview responses:

- 72% of NTRB lawyers responded that they had several internal colleagues they would call on to discuss matters or ask questions
- 49% stated that they turn to external contacts for legal support and assistance, and
- 44% mentioned their supervisor as someone they would approach to ask questions or talk matters through with (see Table F61).

²⁸³ This figure includes all of the seven principal legal officers who responded the question.

Proposal

We propose that a mentoring scheme for NTRB lawyers be established, as well as an alumni network of former NTRB lawyers. The mentor scheme would utilise the alumni as well as other legal professionals working outside the NTRB system.

Implementation

The human resources manager referred to in Strategy 3 should have a role in facilitating the establishment of these schemes, in recruiting mentors and coordinating the involvement of NTRB lawyers. There will also be a role for monitoring the mentor relationships.

3.3.4 Strategy 15: Management training for non-legal NTRB managers

As noted in Strategy 9, the ability of any worker to effectively perform their functions is contingent upon the existence of strong leaders and good management structures. The majority of NTRB lawyers made reference to the importance of management structures and support from management for their effectiveness. Well-planned and implemented office systems and an understanding at the senior management level of native title processes were also seen to be important in this context. A number of NTRB managers expressed enthusiasm about gaining exposure to management training.

The necessity of having well-skilled support staff (and in particular, staff with paralegal skills) was also commonly raised by interviewees and is accordingly noted in this Report. However, it was not possible within the constraints of the Project to further explore options for developing this type of support.

Proposal

It is accordingly proposed that professional development opportunities in the form of management training be made available to NTRB managers, such as CEOs and unit managers. In particular, it is suggested that a second NTRB professional development scholarship scheme, directed at NTRB managers (in contrast to Strategy 7), be established. Ideally, the scheme would involve one NTRB chief executive annually participating in an advanced management program (also known as an 'AMP') at a leading institution, funded through an industry scholarship or through the educational institution itself. A condition requiring recipients of such scholarships to stay within the NTRB system for a certain period of time, similar to that attaching to the Rio Tinto NTRB scholarships, would need to be applied (see Strategy 7 and Appendix 8). The Project Team is currently in discussions with various private sector entities about the creation of such a scholarship program.

Implementation

Establishing a scholarship scheme for NTRB managers would involve the following:

- identification of appropriate courses
- identification of and negotiation with potential sources of funding
- design and advertisement of application process
- administration of the selection process, and
- monitoring progress and outcomes.

These tasks would fall within the responsibilities of the human resources manager referred to in Strategy 3. Alternatively, these organisational aspects can be performed by a consultant engaged to administer the process on a part-time basis over a one month period.

3.3.5 Strategy 16: Professional development opportunities for NTRB field officers

During our research we found that, in some NTRBs, field officers are performing more than purely logistical roles; ²⁸⁴ rather, they are acting as mentors to junior lawyers, assisting them to better understand the communities they are working with and to develop skills for communicating with their clients. For example, one lawyer described the role of field officers as follows:

[They are] critical – as a two way interface they ensure that I am aware of cultural and political issues affecting the communication and they also interpret/clarify information provided to clients. They are also critical in strategising about the best way to inform people and to achieve a range of objectives or outcomes, and also to follow up on my initial communication to discuss it with people and to facilitate the desired outcomes of the communication.

Another lawyers commented that field “have been crucially important in helping me communicate with the different community groups I work with, and I take my lead from them in working out the appropriate way to communicate and behave in different environments”. See Table F62.

This results in the lawyers better understanding their clients’ needs, enabling them to be more effective advocates for their clients. This translates into more successful outcomes and better job satisfaction for the lawyers, leading to longer retention. Consequently, a strategy of investing in field officers to enable them to support lawyers in this way would potentially have significant benefits for the system – lawyers more capable at communicating with their clients.

Strong relationships with client groups are critical to the efficient functioning of NTRBs and resolution of native title matters. Given the past and present circumstances of many Indigenous communities, this requires considerable time to be invested in building trust and communication between community groups and their lawyers. Building such relationships can be made even more difficult given the generally short retention of NTRB lawyers, as this often results in frustration amongst clients and loss of corporate knowledge. Consequently, the strongest links between NTRBs and their client base often occurs through (Indigenous) field officers.

There is widespread and strong interest from NTRB lawyers and managers alike for the development of strategies to better support field officers so that they can play a greater role in ensuring that clients are provided with the most appropriate advice possible.²⁸⁵ It is also apparent that many field officers have the skills, knowledge and interest to move beyond a logistical role. In particular, many have a knowledge of communities, cultural protocols and sometimes languages that greatly assists in communication.

Accuracy and understanding in conveying instructions and information between legal staff and their clients could be enhanced through a greater involvement of field officers in this

²⁸⁴ As noted in n. 7 above, the role of field officers is generally to assist in communications between NTRBs and the communities they serve.

²⁸⁵ In addition to feedback indicating this from our consultation process, this has been recognised in other studies. For example, the 2004 Williams and Bauman Report reported that participants in their study felt that “supporting and enhancing” the status of NTRB Indigenous liaison staff would lead to an increase in the effectiveness of the “two-way interpretation process between Indigenous communities and NTRBs” (2004 Williams and Bauman Report, p 23).

process. In addition to this benefit, such investment in field officers would have the broader benefit of increasing the skill-base of Indigenous communities which could be of use in their pursuit of opportunities for economic development more generally. This strategy does not seek to involve field officers in instruction-taking – lawyers should always advise and receive instructions directly. Rather, it seeks to provide field officers with the skills in order that they can better support lawyers in the vital communication process.

This type of initiative has been implemented by HREOC, through the National Indigenous Legal Advocacy Courses ('NILACs'), in recognition that:

*Field Officers (or Legal Advocates) in Aboriginal and Torres Strait Islander Legal Services possess the skills and knowledge about local Indigenous communities which are vital to the provision of culturally appropriate legal representation. Field Officers are, however, severely restricted in the performance of their duties by the lack of legal training available to them.*²⁸⁶

The aims of the NILACs are:

*To provide Aboriginal and Torres Strait Islander peoples with the competency and skills to work in a legal environment and to understand their human rights. The courses are specifically designed to meet the needs of Aboriginal Field Officers (or Legal Advocates) in Aboriginal and Torres Strait Islander Legal Services... The courses do not provide students with legal qualifications or enable them to dispense legal advice. Instead, they seek to improve the level of skills and knowledge training available for Indigenous peoples working in legal environments or participating in community justice mechanisms and advisory positions. They provide the opportunity to study the operation of the law from the perspective of Indigenous peoples, their cultures, aspirations and social context.*²⁸⁷

Given the parallels between the aims and rationales of the HREOC course and those of the current proposal, it would be instructive to consider the content and approaches to delivery of, as well as feedback on, the NILACs in the identification of suitable courses for NTRB field officers.

Proposal

To achieve this, training needs to be provided to field officers to improve their understanding of some basic native title concepts, law and processes. Other types of training, such as conducting meetings, taking minutes, interviewing and taking statements, as well as general training (for example, computer literacy), may also be appropriate.

We expect that a professional development program for Indigenous field officers directed at the above would have the following outcomes:

- expanded employment options for Indigenous peoples
- increased participation of Indigenous peoples in delivery and development of native title and related fields
- increased capacity of NTRBs to provide culturally appropriate legal representation
- increased capacity of NTRBs to manage claimant group expectations, focus on pragmatic approaches and thereby achieve more sustainable agreements

²⁸⁶ HREOC, www.hreoc.gov.au/social_justice/nilac/index.html at 20 January 2004.

²⁸⁷ *Ibid.*

- enhanced career development opportunities for Indigenous field/liaison officers in NTRBs
- enhanced communication of advice and instructions between NTRBs and their clients, and
- improved management of workload distribution within NTRBs, and enhanced capacity of lawyers.

Given the improved skills within broader communities and the local Indigenous economic development benefits that could flow from the investment in field officers, industry participants in each NTRB region should be encouraged to assist in the delivery of associated training opportunities.²⁸⁸

Implementation

Providing professional development opportunities for NTRB field officers will involve the following:

- identification of appropriate courses – courses to consider include HREOC's NILACs, TAFE courses and community-run programs
- liaison with local industry participants
- promotion of the opportunities and benefits to field officers and NTRB staff generally
- support for field officers participating in courses, and
- monitoring of the benefits of training undertaken.

These tasks would fall within the responsibilities of the human resources manager referred to in Strategy 3. Alternatively, these roles could be performed by a consultant engaged to administer the process on an ongoing part-time basis.

²⁸⁸ This broader benefit was also recognised in the 2004 Williams and Bauman Report: "The point was made that Indigenous liaison officers are in many cases the leaders of the future, and building their capacity will build the capacity of their communities" (2004 Williams and Bauman Report, p 23).

3.3.6 Strategy 17: Professional association for NTRB lawyers

Proposal

It is recommended that the possibility of establishing a professional association of NTRB lawyers, under the infrastructure of an existing law society, be explored. This would provide a further mechanism for facilitating communication among NTRB lawyers. It would also promote relationship building and knowledge sharing with native title lawyers working outside the NTRB system, and would provide a professional forum for discussing operational and policy issues such as legal ethics. This would be particularly valuable given the particularities of native title law and the relatively low numbers of lawyers involved in the field.

As an alternative to this task being performed by the human resources manager proposed in Strategy 3 or by members of the team responsible for the information service proposed in Strategy 12, regular meetings (whether in person, or via telephone or video-link) of senior NTRB lawyers should be facilitated through such an association.

Implementation

Forming a professional association of NTRB lawyers will involve the following:

- communication with relevant Law Societies to discuss options
- further consultation with NTRB lawyers to determine the most appropriate arrangements for any such association, and
- secretarial support once an association is established.

The human resources manager referred to in Strategy 3 would be best placed to undertake the relevant research, identify alternatives and consult with NTRB managers and lawyers on the most suitable option. Alternatively, a consultant could be engaged for a period of one month to undertake this role.

4. Conclusion

Our conclusion is that the delivery of legal services by NTRBs is inhibited as a result of early resignation of lawyers and difficulties in the timely recruitment of lawyers. Issues such as native title jurisprudence, adequacy of funding and the role of government agencies and other parties in the process also have an impact but are beyond the scope of this Project. This Report identifies particular needs in relation to recruitment and retention of NTRB lawyers. In particular, without formalised training or coordinated systems for sharing information and procedural advice, valuable corporate knowledge is neither adequately developed nor utilised. Ultimately, this can lead to costly delays, repetition and further resignations, as lawyers are left feeling overwhelmed, compounding these problems.

The research demonstrates that NTRB lawyers require improved support structures in order to enhance their professional functioning. Given the complexity and pace of change in native title law and practice, the distinct political and cultural dimensions involved, and the isolated environment in which NTRB lawyers often operate, this need is particularly acute. A formalised system for sharing knowledge and accessing expertise is needed.

As identified earlier, oiling the native title machinery, by supporting NTRBs and their lawyers, is essential to capitalise on the more than \$1 billion investment made to date in the native title system. Investing in the professional development of NTRB lawyers is urgently required. The recommendations and each of the strategies proposed in this Report seek to build, or provide tools to enhance, the capacity of individual NTRB lawyers and, thus, of the NTRB system as a whole, thereby enabling the system to deliver results that will assist in the economic and social empowerment of Indigenous communities, and allow for the achievement of better results for stakeholders in the broader system.

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- Tehan M, 'A Hope Disillusioned, an Opportunity Lost? Reflections on Common Law Native Title and Ten Years of the *Native Title Act*' (2003) 27(2) *Melbourne University Law Review*
- Waia T and Reid G, "*Public Works*": *practical implications and legal arguments about extinguishment of native title by the construction of public works on Torres Strait Islander land*, paper delivered at the Native Title Conference, Alice Springs (June 2003)

Other materials

- NTRB organisational materials including annual reports, strategic plans and policy and procedures manuals
- Case law, summaries and commentaries
- Papers from the 2001 Native Title Conference, Townsville
- Papers from the 2002 Native Title Conference, Geraldton
- Papers from the 2003 Native Title Conference, Alice Springs
- Papers from the 2004 Native Title Conference, Adelaide

Appendix 2: Lawyers' questionnaire

Personal

L1. Gender _____

L2. Age _____

L3. What is your educational background?
(i.e. qualifications and year graduated) _____

L4. How long have you been working:

- i. as a lawyer? _____
- ii. in the native title area? _____
- iii. as a NTRB lawyer? _____
- iv. as a lawyer at your current NTRB? _____

L5. What, if any, professional associations (other than the Law Society) are you a member of?

L6. Please provide any other relevant employment history.

L7. What attracted you to working at a NTRB and your current NTRB in particular? How did you find out about the job?

L8. What are your work plans over the next few years?

L9. If you plan to stay in the native title field, how long do you plan to stay and why (please explain reasons for staying and for leaving)?

- i. How long

- ii. Reasons

Workload and supervision

L10. Do you have a particular focus area in your work? (for example, claims, future act negotiations, mining, fishing rights, certain geographic areas)?

L11. How many hours do you work per week? Please explain reasons for any variations.

L12. Do you feel you spend your time on tasks that are not the role of a lawyer? What proportion?

L13. Please give an estimate (in percentage terms) of the proportion of your work time that you spend on the following areas:

	proportion of time (%)
i. Litigation of claims	
ii. Mediation of claims	
iii. Future act matters	
iv. Managing claimant groups	
v. Managing corporate entities	
vi. Strategic planning on claims	
vii. Administrative/secretarial (e.g. filing, photocopying)	
viii. Managing staff	
ix. Organisational management (e.g. dealing with executive, compliance reporting)	
x. Travel	
xi. Other (pls specify)	
xii.	

Nb. use "Tab" button to make more rows if needed

L14. Have you been involved in any matters from initiation to resolution? Please elaborate.

L15. Do you have a role in the prioritisation of claims and/or other matters? If so, please elaborate.

L16. During the claim process, what alternative approaches do you consider and discuss with your clients?

L17. Who do you report to (for example, supervisor, PLO, unit manager, CEO)?

L18. How often do you meet one-on-one with your supervisor (or staff where relevant) to discuss workload, progress, expectations, etc?

L19. Are you satisfied with the frequency and content of these meetings?

L20. Who do you approach to discuss any issues or questions in relation to your legal work and do you feel the level of support is sufficient?

L21. Would a mentor be valuable to you and do you feel you have one?

L22. Please rate how appropriate you feel your workload is for your position and the time you have available. (Please mark "X" in the appropriate box.)

workload too heavy	workload appropriate	workload too light

L23. Are you satisfied with the environment at the NTRB where you work? Please consider the physical environment as well as the organisational culture. (Please mark "X" in the appropriate boxes.)

	very dissatisfied	dissatisfied	sometimes satisfied sometimes dissatisfied	satisfied	very satisfied
i. Physical environment and access to resources					
ii. Organisational culture					

L24. Please list the most significant reasons for your responses in L23.

L25. It has been suggested that resource constraints, the state of the law and government policy are significant impediments to the capacity of NTRBs to effectively represent their clients. It has also been suggested that the following factors can inhibit legal staff from working effectively in representing their clients. Please indicate your view on whether the following factors inhibit effective representation by NTRB lawyers generally, by marking "X" in the appropriate boxes.

	strongly disagree	disagree	no strong opinion	agree	strongly agree
i. Lack of experience					
ii. Lack of training					
iii. Too much work					
iv. Lack of sufficient numbers of legal staff					
v. Lack of sufficient numbers of support staff					
vi. Lack of sufficient quality support staff					
vii. Lack of sufficient communication between legal staff at your NTRB					
viii. Lack of sufficient communication between legal staff of different NTRBs					
ix. Lack of sufficient communication between NTRBs at the organisational level					
x. High turnover rates of legal staff					
xi. Community dynamics (including conflict), whether overt or underlying					
xii. Difficulty communicating with clients					
xiii. Morale/organisational culture					
xiv. Distance/remoteness/cost of communicating with clients					
xv. Travel demands					
xvi. Clients' lack of understanding of NT law					
xvii. Lack of access to relevant documentary resources					
xviii. Lack of access to adequate					

equipment/facilities					
xix. Lack of professional support/advice					
xx. Lack of understanding from other institutions					
xxi. Other (pls specify)					
xxii.					

Nb. use "Tab" button to make more rows if needed

Skills, training and resources

L26. Please list the skills you have developed since working as a NTRB lawyer.

L27. Did you receive any induction when you commenced work at your current NTRB (or previous NTRB where appropriate)? If yes, please describe and assess its value to your current role. If no, do you think you would have benefited from this?

L28. Is there a system in place in your organisation for evaluating your performance? If so, please describe what it involves and how often this occurs. In particular, does it identify your professional development needs?

L29. Please describe any professional development opportunities you have been provided with (e.g. training programs, mentoring systems, opportunities for further study; either internally or externally run).

L30. What strategies, if any, are currently in place or could be used to transfer existing skills and knowledge to others in your organisation and to other NTRBs?

i. Within your organisation

ii. To other NTRBs

L31. In relation to each of the aspects of NTRB legal work listed in the table below, please respond to the questions at the top of each of the first three columns using the following ratings:
 1 = irrelevant
 2 = not important
 3 = of some importance
 4 = crucial

In the fourth column, please indicate the adequacy of any formal training provided through your NTRB (whether directly or indirectly) in relation to these aspects/skills, using the following ratings:

- 1 = none provided
- 2 = adequate
- 3 = inadequate

	Is this an important aspect of your job?	How important would training in this aspect be for you at this point in time?	How important would training in this aspect be for new NTRB lawyers?	How adequate is the (formal) training provided, if any?
(example only) Taking instructions from clients	4	2	4	1
<i>Client relations</i>				
i. Taking instructions from clients				
ii. Communicating with clients				
iii. Advising clients on legal process and options				
iv. Assisting to resolve intra community conflicts				
v. Other interactions with clients that involve cross-cultural sensitivity (e.g., protocols, etiquette)				
vi. Awareness and understanding of local Aboriginal culture and history				
vii. Professional ethics involved in dealing with multi-person claimant groups				
viii. Understanding anthropology, genealogy etc.				
ix. Using Plain English in an Aboriginal context				
x. Cross-cultural issues in the workplace				
xi. Living and working in remote areas				
<i>Practice management</i>				
xii. Working in a team of lawyers				
xiii. Working in multi-disciplinary teams				
xiv. Running meetings (including handling content, facilitating discussions, making presentations, etc)				
xv. Establishment/management of corporate entities (e.g. PBCs)				
xvi. Organisational strategic planning				
xvii. Strategising native title and other options and approaches on individual cases				
xviii. Project management				
xix. Management of staff/management skills				
xx. Time management				
<i>Legal practice</i>				

xxi. Commercial and other negotiations				
xxii. Drafting commercial agreements				
xxiii. Drafting court documents				
xxiv. Representing clients in mediation				
xxv. Future act processes and hearings				
xxvi. Future act negotiations				
xxvii. Court room advocacy				
xxviii. Preparing witnesses				
xxix. Evidentiary matters				
xxx. Proofing witnesses (i.e. 'dry run' of where from, who from and how to take evidence)				
xxxi. On country assessment of evidence				
xxxii. Working with clients to prepare for trial				
xxxiii. Briefing counsel				
xxxiv. Briefing consultants (e.g. anthropologists, historians, archaeologists)				
xxxv. Understanding relevant Federal court role, practice and procedure				
xxxvi. Understanding NNTT role, practice and procedure				
<i>Legal content</i>				
xxxvii. Familiarity with native title statutory scheme				
xxxviii. Familiarity with native title jurisprudence				
xxxix. Familiarity with other statutory schemes (e.g. cultural heritage and State-based land rights legislation)				
xl. Commercial law				
xli. Mining law				
xlii. Trusts law				
xliii. Tax law				
xliv. Administrative law				
<i>Other (pls specify)</i>				
xliv.				

Nb. Use "Tab" button to make more rows if needed

Please provide details of any training you have undertaken in relation to any of the aspects listed in the table above.

L32. Think about the NTRB lawyers you believe are very effective. What are the key qualities and attributes that characterise them and make them effective?

L33. Different NTRBs have different focuses and consequently different strengths. What would you say are the particular strengths of your organisation (e.g. litigation, agreement-making, external networking, training, recruitment, organisational culture, etc)?

L34. Of the aspects listed above in L31 or any others you have identified, which do you think are the most challenging aspects to master?

L35. What are your top priorities for formal training and professional development?

L36. In terms of training and professional development, would one-week intensive, two-day intensive or periodic ongoing (e.g. one day per month) programs be preferable for you? Please give reasons.

L37. Which of the following training formats would be appropriate? (Please mark "X" in the appropriate boxes.) Please also indicate your preference.

	inappropriate	appropriate	preference
i. Lectures			
ii. Group-based workshops (e.g. case studies, role plays)			
iii. Individual by correspondence			
iv. Web-based (e.g. WebCT)			
v. Other (pls specify)			
vi.			

L38. Please describe how you keep abreast of developments in native title that may impact on your legal practice.

L39. Would access to case summaries and analysis on audio tape/audio CD/MP3 files be useful, for example for lawyers to listen to on long drives?

L40. What level of access do you have to relevant documentary resources? (Please mark "X" in the appropriate boxes.)

	irrelevant to my work	inadequate access	adequate access	excellent access
i. Relevant forms (e.g. NNTT and FCA)				
ii. Relevant forms with annotations				
iii. Case law (e.g. judgments and summaries)				
iv. Legislation				
v. General reports (e.g. academic papers,				

govt reports)				
vi. Case-specific research (e.g. anthropological reports, historical documentation)				
vii. Precedents for court submissions, affidavits etc.				
viii. Precedents with annotations				
ix. Model agreements				
x. Model agreements with annotations				
xi. Legal opinions				
xii. Relevant journals and newsletters				
xiii. Internal library				
xiv. Internet resources				
xv. NTRB annual reports				
xvi. NTRB strategic plans				
xvii. Other (pls specify)				
xviii.				

Nb. Use "Tab" button to make more rows if needed.

L41. Please list the internet sites you use and indicate how often you use them. (Please mark "X" in the appropriate boxes.)

	rarely	sometimes (e.g. couple times month)	frequently (e.g. couple times week)	daily
i.				
ii.				

L42. Is there anything you particularly like or dislike about any of these web-based services?

L43. Please indicate what IT capabilities and services you have access to. (Please mark "X" in the appropriate boxes.)

	yes	no	don't know
i. Broadband or ADSL internet connection in the office			
ii. Broadband or ADSL internet connection at home			
iii. Dial-up internet connection at home			
iv. Networked computers in the office			
v. High speed printing			

L44. If you have access to journals and newsletters (including those you access on-line), please list which you use and indicate how often you use them. (Please mark "X" in the appropriate boxes.)

	rarely	sometimes (e.g. couple times month)	frequently (e.g. couple times week)	daily
i.				
ii.				

L45. Please explain what you use them for (e.g. look at them as soon as come out for general update, or use to search on particular topics) and whether they satisfy your needs.

L46. It has been suggested that a website designed specifically to cater for the needs of NTRB lawyers might be a useful tool. Please consider the proposed structure and functions suggested below and then answer the questions that follow.

Structure	<ul style="list-style-type: none"> • Developed to the requirements of NTRBs • Editorial board of experts to ensure currency, consistency and quality • Regularly updated • Comprising restricted access section (only for NTRB staff) and public access section • Phone/email help-line
Content and Functionality	<ol style="list-style-type: none"> a. Links to relevant documents b. Searchable database of NTRB lawyers including their areas of experience (and other information – see L47) c. Repository of select court document precedents, annotated to explain the need for particular clauses d. Repository of or links to case summaries and commentaries e. Repository of or links to select agreements and template agreements, annotated to explain content and strategies f. Sophisticated search capabilities g. Directory of useful contacts (possibly including law firms offering pro bono assistance, NTRB alumni, consultants from various disciplines) h. Directory of relevant educational and training resources i. On-line discussion forum for exchange of opinions and advice on NT issues j. Message board for information exchange between NTRBs

i. Would you use such a website? If not, why not?

ii. Are there any aspects of the proposed website that you would find particularly useful?

iii. Are there any other functions or content that you would add?

iv. Are there any aspects of the proposed website that would not be useful and you would suggest removing?

v. Please provide any other comments in relation to this proposal.

L47. If you believe a searchable database of NTRB lawyers' contact details and native title experience would be valuable, please indicate what types of information you would find it useful to have access to. (Please mark "X" in the appropriate boxes.)

	not valuable	not sure	valuable
i. Matters involved in			
ii. Judges appeared before			
iii. Agreements worked on			
iv. Mining companies negotiated with			
v. State government departments negotiated with			
vi. Area of practice/expertise (e.g. mining, petroleum, fishing)			
vii. Law firms/lawyers worked with			

viii. Consultants worked with (e.g. anthropologists, historians)			
ix. Other (pls specify)			
x.			

Nb. Use "Tab" button to make more rows if needed.

L48. Would you be happy for your contact details and information on your experience to be available on a website? Note only NTRB staff would have access to these details.

Communication within and between NTRBs

L49. How often do you communicate with other NTRBs (e.g. daily, weekly, monthly, irregularly, etc)? Please explain why you communicate (e.g. cooperation over claims, negotiations, engagement of external advisers) and if you think this is important.

L50. Is this level of communication sufficient? (Please mark "X" in the appropriate box.)

not enough communication	sufficient	too much communication

L51. If you believe more communication would be valuable, please indicate which of the following mechanisms for contact between NTRBs and others would be most useful for NTRB lawyers in order to effectively represent their clients? (Please mark "X" in the appropriate boxes.)

	not valuable at all	of some value	very valuable
i. Conferences for NTRB lawyers and other professionals			
ii. Conferences for NTRB lawyers only			
iii. Workshops on specific topics for NTRB lawyers with external counsel			
iv. Workshops on specific topics for NTRB lawyers only			
v. Group conference calls in relation to specific topics or areas of practice			
vi. Website designed specifically for NTRB lawyers (see L46-L47 above)			
vii. Other (pls specify)			
viii.			

Nb. Use "Tab" button to make more rows if needed

L52. Who do you work with most often – claimant group or a representative working group?

L53. Who do you take instructions from? (Please mark "X" in the appropriate boxes.)

	never	sometimes	usually	always
i. Named applicants				
ii. Whole claimant group through community meetings				
iii. Representative working group (i.e. claimant's negotiating committee)				
iv. Individual group spokesperson				

v. Other (pls specify)				
------------------------	--	--	--	--

L54. Please describe any issues that arise in relation to taking instructions (e.g. in assessing levels of consensus, or in identifying who has the authority to speak for others).

L55. In taking instructions, do you work with field officers (or equivalent) and/or interpreters? (Please mark "X" in the appropriate boxes.)

	never	rarely	sometimes	often	always
i. Field officers (or project officers or ALOs)					
ii. Interpreters (including those not formally engaged)					
iii. Other (pls specify)					

L56. Please describe the usefulness of field officers/interpreters in assisting you to communicate with clients. If you never or rarely work with them, please provide reasons for this.

i. Field officers

ii. Interpreters

L57. What are the barriers, if any, to effective communication with clients? Do you have any suggestions on how these could be overcome?

External networks

L58. Please rate the performance of the following bodies in facilitating the resolution of matters. (Please mark "X" in the appropriate boxes.)

	always obstructive	often obstructive	sometimes helpful sometimes obstructive	often helpful	always helpful
i. NNTT					
ii. Federal Court					
iii. Other NTRBs					
iv. State government departments/agencies					
v. State government respondents and their lawyers					
vi. Commonwealth government respondents and their lawyers					
vii. Non-government respondents and their lawyers					
viii. Other (pls specify, e.g. relevant State/regional bodies)					
ix.					

Nb. Use "Tab" button to make more rows if needed.

Please give reasons.

L59. To what extent do you find working with external counsel helpful in the resolution of matters? Please give reasons. If you encounter difficulties in working with external counsel, please elaborate.

L60. To what extent do you find working with non-legal advisers helpful in the resolution of matters? Please give reasons. If you encounter difficulties in working with non-legal advisers, please elaborate.

L61. To date, it appears that native title is not particularly high on the list of pro bono priorities of the large commercial law firms. Would their pro bono assistance in any of the forms described below be valuable to NTRBs? (Please mark "X" in the appropriate boxes.)

	not valuable	not sure	valuable	very valuable
i. Legal advice on particular matters				
ii. Mentoring of NTRB lawyers				
iii. Secondments of lawyers from law firm to NTRBs for particular project/matter				
iv. Secondments of lawyers from law firm to NTRBs for general purpose				
v. Preparation of precedents (NT or non-NT)				
vi. Internships for Indigenous non-legal NTRB staff				
vii. Other (pls specify)				
viii.				

Nb. Use "Tab" button to make more rows if needed.

L62. Do you think experience at a commercial/private law firm is valuable for someone working as a NTRB lawyer? (Please mark "X" in the appropriate box.)

not valuable at all	of some value	very valuable

L63. If you believe experience at a commercial law firm is valuable, what do you think is the minimum length of time that a lawyer needs to work at such a firm to have gained sufficient commercial skills and experience to operate effectively at an NTRB? What is the ideal length of time?

L64. Are student interns valuable to NTRBs? (Please mark "X" in the appropriate box.)

not valuable at all	of some value	very valuable

Please give reasons.

L65. What incentives would be valuable in attracting lawyers to NTRBs? (Please mark "X" in the appropriate boxes.)

	not valuable at all	of some value	very valuable
i. Secondments to commercial law firms			
ii. Exchanges to other NTRBs			
iii. Sabbatical programs			
iv. Availability of mentors			
v. Part-time study leave opportunities			
vi. Scholarships for Indigenous non-legal NTRB staff to pursue legal studies			
vii. Other (pls specify)			
viii.			

Nb. Use "Tab" button to make more rows if needed.

L66. What incentives would be valuable in retaining NTRB lawyers? (Please mark "X" in the appropriate boxes.)

	not valuable at all	of some value	very valuable
i. Secondments to commercial law firms			
ii. Exchanges to other NTRBs			
iii. Sabbatical programs			
iv. Availability of mentors			
v. Part-time study leave opportunities			
vi. Other (pls specify)			
vii.			

Nb. Use "Tab" button to make more rows if needed.

L67. Do you think it would be valuable to have access to a network of interested NTRB alumni (i.e. former NTRB lawyers) for advice on matters relating to your work?

L68. If you were to leave your organisation, would you be willing to stay involved in the field in any of the following ways? (Please mark "X" in the appropriate boxes.)

	yes	no	don't know
i. As part of a NTRB alumni program through which NTRB staff could seek advice			
ii. Informal mentor to a particular NTRB lawyer			
iii. Other (pls specify)			

Other

L69. Please comment on any subject not covered in the previous questions that represents an important issue for you in your native title work or that provides further suggestions for providing support to NTRB lawyers or more generally in relation to the project.

Appendix 3: Managers' questionnaire

Workloads

M1. *[CEO only]* Please provide details of your educational background and professional experience.

M2. How many staff are there (i) in total in the organisation and (ii) working on native title matters/in the administration of the NTA?

i. _____ ii. _____

M3. What is the breakdown of those staff (i.e. how many lawyers, field officers, researchers, administrative staff, historians, anthropologists, etc)?

	whole org	NT area
i. Managerial	_____	_____
ii. Legal staff	_____	_____
iii. Anthropologists	_____	_____
iv. Field/project officers	_____	_____
v. Researchers	_____	_____
vi. Administrative staff	_____	_____
vii. Linguists	_____	_____
Other (pls specify)	_____	_____
viii.	_____	_____

M4. Please describe how the organisation is structured in terms of legal functions (for example, does it have a separate future act unit or heritage unit?).

M5. Please describe how workloads are distributed across legal staff (for example, by geographic area or by type of native title matter).

M6. Please describe how workloads are monitored.

M7. How many new claims and future act notifications are lodged per month/quarter/year?

M8. Can the number of new claims and notifications be anticipated and planned for? If no, does this have an impact on the efficient running of your organisation?

M9. What role if any, does your organisation play in the management of PBCs or post-determination land management?

Outcomes

M10. *[CEO only]* What do you see as the strengths of your organisation (e.g. litigation, commercial negotiations, organisational culture, external networking, training, recruitment)?

M11. What is your assessment of the standard of communication between your lawyers and their client group? What methods do you use to facilitate communication (e.g. ALOs, interpreters, cross-cultural training)?

M12. What have been the major achievements of your organisation in the past 3-5 years?

M13. Please describe how your organisation defines outcomes.

M14. Are such outcomes measured? If so, how?

M15. Please describe what impact, if any, resourcing levels have on decision-making in relation to pursuing matters.

M16. Please comment on the performance and outcomes of your legal staff.

M17. What is your assessment of the capacity of your legal staff to keep up with native title law and changes?

Recruitment

M18. Please describe the process for recruiting legal staff and comment on where you have found advertising to be the most effective (e.g. local newspapers, national newspapers, native-title-related newsletters, native-title related websites).

M19. When recruiting new lawyers, what importance do you attach to (i) knowledge of and training in native title law and (ii) personal attributes? Which is more important?

M20. In relation to legal positions advertised over the last three years, have there been sufficient applicants for there to be a competitive process for appointments? (Please mark "X" in the appropriate box.)

never	rarely	sometimes	often	always

M21. In relation to legal positions advertised over the last three years, on average how many applications have been received?

M22. In relation to legal positions advertised over the last three years, on average how long has it taken to fill the positions?

M23. In relation to applications for legal positions advertised over the last three years, how would you describe the quality of applicants? (Please mark "X" in the appropriate box.)

less than adequate	adequate	more than adequate	outstanding

M24. Over the last three years, what has been the usual turnover time for legal staff? Is this in any way an issue for the organisation and, if so, are there any strategies in place to address this?

M25. *[CEO only]* Is there an induction program for legal staff commencing employment with your organisation? If yes, please describe.

M26. *[CEO only]* Does your organisation have a training/professional development program? If yes, please describe.

M27. Does your organisation have an article clerk program? If yes, please describe the program, including an overview of the types of work undertaken by article clerks. Please also comment the retention of article clerks as NTRB legal staff.

M28. Does your organisation have a student volunteers program? If yes, please describe the program, including an overview of the types of work undertaken by students. Please also give an assessment of the impact it has on recruitment.

M29. What strategies have you used that have been particularly successful in recruiting or supporting staff?

Management and supervision

M30. How often are update/team meetings held?

M31. Please describe the type of management style that is used in the organisation (for example, command, collective, consultative).

M32. Please describe how new claims are prioritised and responded to, and what role your organisation's executive has in this process.

M33. In relation to monitoring outcomes, how appropriate and useful are reporting requirements for NTRBs? (Please mark "X" in the appropriate box.)

Inappropriate/useless	sometimes appropriate/useful sometimes inappropriate/useless	appropriate/useful

Please give reasons.

M34. Do you think an expert strategic planning consultant dedicated to rep bodies would be useful to assist with the preparation of strategic plans for your organisation?

M35. Have you undertaken any management training either prior to or since joining your organisation?

M36. Please describe how you deal with overlapping claims. Is there a process for dealing with potential conflicts of interest?

Working relationships

M37. To what extent are matters briefed out to external counsel? To what, if any, extent is this affected by resource constraints?

M38. What criteria does your organisation use to decide to brief barristers?

M39. What criteria does your organisation use to engage external advisers (other than barristers)?

M40. *[CEO only]* Do you think greater contact and information exchange with other NTRBs would be beneficial?

Other

M41. Please provide copies of the following, where available.

Annual report	
Organisational chart	
Strategic plan	
Training program	
Induction manual	

M42. *[CEO only]* Please comment on any subject not covered in the previous questions that represents an important issue for you in relation to your organisation's native title functions or that provides further suggestions generally in relation to the project.

Appendix 4: Training and other professional development activities run by mid-size and large law firms

A. Subjects covered in training sessions by law firms

Skills training sessions cover a variety of legal and commercial subjects relevant to legal practice including:

Practice areas

- Commercial law (covering basic principles, new developments and the interface between principles and their practical application)
- Commercial skills
- Negotiation skills
- New developments in the law

Legal research and work management

- How to draft legal documents in plain English language
- Legal research and library skills (including online databases)
- How to delegate tasks appropriately and effectively
- Supervision skills for supervisors (including how to give effective and motivational feedback, and how to aid in the professional development of juniors)
- Supervision skills for junior lawyers (including how to take instructions from a supervisor, how to listen, how to ask questions and how to manage workloads)
- Effective time management and organisation
- Document management

Communication skills

- Interpersonal skills
- Effective communication
- Conflict management
- Presentation skills

Client contact

- How to conduct effective client meetings
- Effective communication of legal concepts to clients
- How to develop and retain good relationships with clients

Business skills

- Financial management for lawyers
- Knowledge of business structures and systems
- Knowledge of financial markets and commercial imperatives
- Risk management and work processes

B. Other professional development activities and initiatives

Mentoring

- 'Buddy' systems for articled clerks and all new employees so as to ensure that the new employee receives guidance and support on all work-related matters (new graduates

are 'buddied' with a 1st to 3rd year solicitor who is available to answer questions individually; 'buddies' may also run sessions as a group)

- Mentoring programs between junior and senior lawyers so as to enhance professional development and overcome workplace hierarchies
- Performance reviews and positive feedback sessions

Team-building

- Annual retreats for practice groups
- Post-matter debriefing

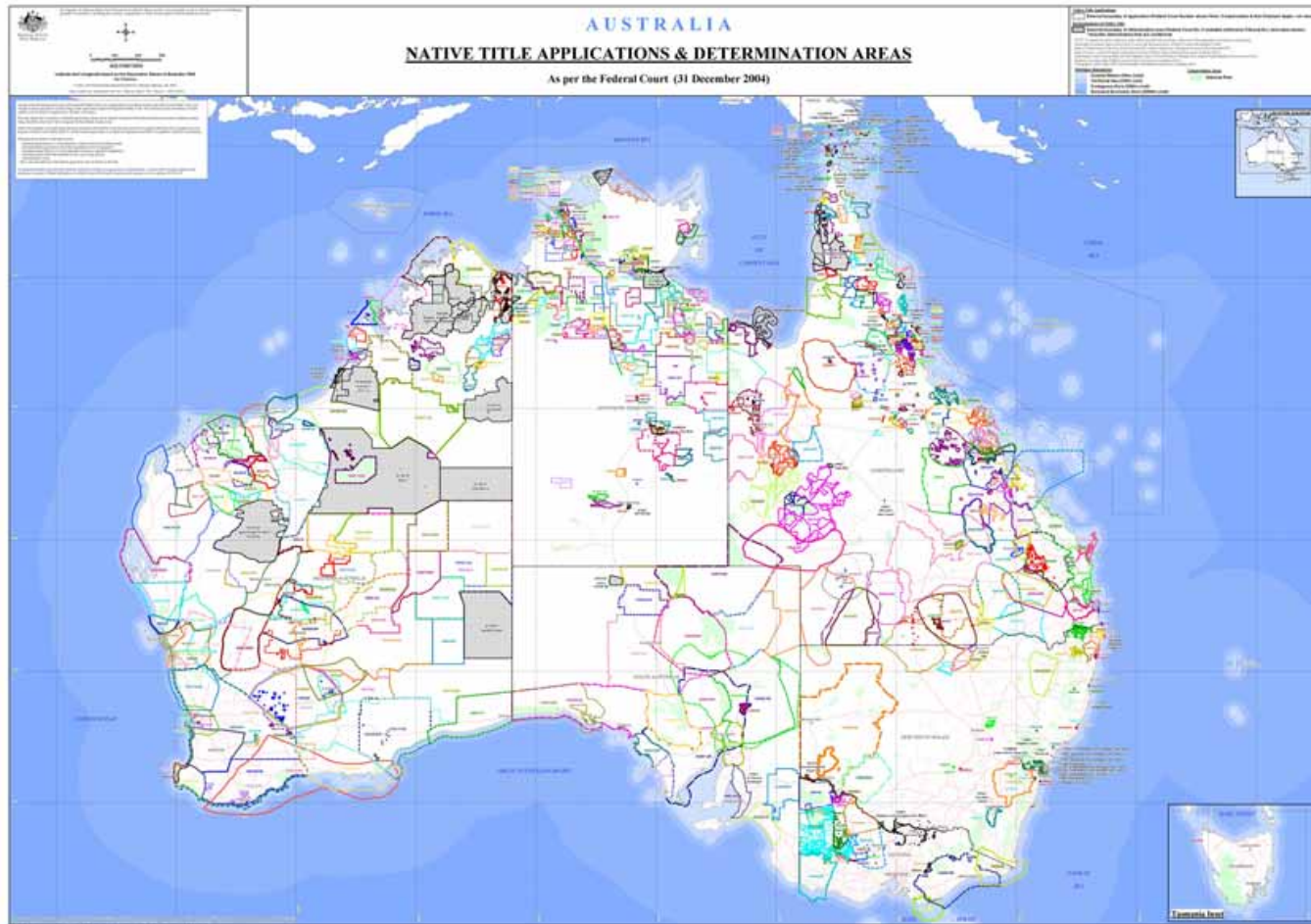
Keeping abreast of legal developments

- Seminars on new developments in the law
- Provision of financial support for lawyers' attendance at practical legal training courses

Keeping in touch with clients

- Seminars and publications on legal developments relevant to client groups
- Secondments to client organisations

Appendix 5: Map showing geographic extent of native title determinations



Source: Tribunal, http://www.nntt.gov.au/publications/data/files/National_FC_NTDA_Schedule.pdf at 1 April 2005 (this is an interactive version of the above map)

Appendix 6: Major achievements of 2004 in native title matters by State/Territory

Outcomes achieved through the native title system during 2004 include the following:

Western Australia

- conclusion of negotiations in relation to the State Government's commitment to settling the Wongatha and Esperance Nyungar claims through formal mediation
- agreement reached regarding the Ngaanyatjarra claim, representing the country's "largest native title settlement", covering 188,000 sq km of Western Australia's central desert region³⁴⁰
- determination of the Karajarri people's native title claim in their favour,³⁴¹ over 5,600 sq km in the Kimberley
- determination that native title exists in relation to the Wanjina-Wunggurr Wilinggin native title determination no. 1 in the Kimberley³⁴²
- signing of the Broome Land Agreement in October 2004 between the State Government and the Rubibi claimants³⁴³
- agreement reached in relation to a mediation protocol between the claimants for the Single Noongar claim and the State Government³⁴⁴
- agreement reached between the Shire of Derby/West Kimberley and the Nyikina Mangala people³⁴⁵
- signing of an ILUA between the Eastern Guruma people, mining companies and the State Government, in relation to 6,774 sq km of land in the Pilbara³⁴⁶
- agreement reached between the Pastoralists and Graziers Association and the Goldfields Land and Sea Council, regarding a set of principles for negotiating access to pastoral leases³⁴⁷
- negotiations finalised between the State Government, Peak Industry Bodies and Yamatji on a Standard Heritage Protection agreement allowing for the streamlining and improvement of native title processes in relation to minerals exploration throughout the Pilbara, Murchison and Gascoyne
- negotiation protocols signed between Yamatji and (respectively) BHP, Rio Tinto, Fortescue Metals Group and Hope Downs in relation to multiple native title claim groups
- agreement reached on a Mediation Program for the resolution by negotiation of all native title claims represented by Yamatji in the Pilbara, Murchison and Gascoyne –

³⁴⁰ The Hon. Eric Ripper MLA, 'Largest-ever native title settlement reached', *Government of Western Australia Media Statement* (23 December 2004), www.mediastatements.wa.gov.au/media/media.nsf at 25 January 2005. The agreement is in respect of the Gibson Desert, Tingarri Tjina, Tjirrkarli Kanpa, Warburton-Mantamaru, Irrunytju Papulankutja, and Baker Lake claims.

³⁴¹ *Nangkiriny v State of Western Australia* [2004] FCA 1156.

³⁴² *Neowarra v State of Western Australia* [2004] FCA 1092.

³⁴³ *Gallop Government's Achievements 2001-2005*, p 80, www.premier.wa.gov.au/docs/achievements/achievements_report_2001_to2005.pdf at 1 April 2005.

³⁴⁴ *Ibid.*

³⁴⁵ Tribunal, Media Release, http://www.nntt.gov.au/media/1079908890_684.html at 31 January 2005.

³⁴⁶ Tribunal, Media Release, http://www.nntt.gov.au/media/1079307253_2096.html at 31 January 2005.

³⁴⁷ Tribunal, Media Release, http://www.nntt.gov.au/media/1075776220_1904.html at 31 January 2005.

the Program has been filed with the Federal Court without any objections from other parties and substantial progress has been made against the milestones prescribed in it

- significant future act agreements reached between various claims groups represented by Yamatji and (respectively) Gunson Resources, St Barbara Mines, Gulliver, Consolidated Minerals, Range River Gold and BGC

Queensland

- resolution of the majority of the Wik and Wik Way peoples' claims to 12,530 sq km in the Cape York Peninsula
- agreement reached in relation to the Yalanji claim north of Cairns
- settlement of Memoranda of Understanding between the Ewamian people and pastoralists
- signing of Memoranda of Understanding between the Waluwarra/Georgina River people and cattle industry leaders
- completion of the Djabugay peoples' claim to over 2,800 hectares of land, just north-west of Cairns, becoming the first claim to be recognised over a national park in Australia without litigation
- finalisation of three ILUAs between nine traditional owner groups which enabled the North Queensland Gas Pipeline Project to go ahead³⁴⁸
- determination of the Wellesley Islands sea claim in favour of the claimant group, involving a finding that native title exists over sea areas in the Gulf of Carpentaria³⁴⁹
- resolution of claims in the Torres Strait on behalf of the Boigu people, the Ugar people, the Badulgal, the Erubam Le, the lama people and Tudulaig, by consent determination (including agreements with the State Government, Telstra, Ergon Energy and other parties)
- native title found to exist in the entire determination area in relation to the claims of the Gebara Islanders³⁵⁰ and the Kulkalgia people³⁵¹ in the Torres Strait
- substantial resolution of the long-standing public works issue in the Torres Strait³⁵²

Northern Territory

- determination that native title exists for the Alyawarr, Kaytetye, Warumungu, Wakay native title claim group³⁵³ over 1143 sq km of land south-east of Tennant Creek (known as the Davenport/ Murchison claim)
- prosecution of the Larrakia Darwin claim and of the Blue Mud Bay case
- settlement of the St Vidgeon and the Township of Urapunga appeals
- finalisation of the Sweetpea petroleum exploration agreement
- completion of negotiations in relation to the Bootu Creek manganese mine near Tennant Creek and the Arafura 'Mt Porter' gold mine near Pine Creek
- signing of an ILUA between the Lhere Artepe Aboriginal Corporation, on behalf of the Arrente peoples, and the Northern Territory Government, releasing residential land in Alice Springs

³⁴⁸ Tribunal, Media Release, www.nntt.gov.au/media/1074653088_668.html at 31 January 2005.

³⁴⁹ *Lardil Peoples v State of Queensland* [2004] FCA 298.

³⁵⁰ *Newie on behalf of the Gebaralgal v State of Queensland* [2004] FCA 1577.

³⁵¹ *Warria on behalf of the Kulkalgia v State of Queensland* [2004] FCA 1572.

³⁵² See n. 116 above.

³⁵³ *Alyawarr, Kaytetye, Warumungu, Wakay Native Title Claim Group v Northern Territory of Australia* (2004) 207 ALR 539; [2004] FCA 472.

New South Wales, South Australia and Victoria

- registration of South Australia's first ILUA with mineral explorers, regarding the Antakirinja native title claim over 41,156 sq km of land around Coober Pedy³⁵⁴
- settlement of an ILUA regarding the Arabunna native title claim³⁵⁵
- signing, by four local councils, the Narungga people and the State Government, of the first native title agreement in South Australia which determines a protocol for planning and infrastructure in the area subject to the agreement³⁵⁶
- finalisation of the Yorta Yorta Co-operative Management Agreement
- signing of an intra-Indigenous memorandum of understanding between the Nambucca Heads Local Aboriginal Land Council, the Unkya Local Aboriginal Land Council, the Gumbaynggirr people and the Jaambiny Negotiating Panel, which sets out how the groups will participate in united negotiations with the New South Wales Government
- finalisation of pro forma ILUAs for exploration and mining licences in Victoria

³⁵⁴ Tribunal, Media Release, www.nntt.gov.au/media/1087449328_472.html at 31 January 2005.

³⁵⁵ *Ibid.*

³⁵⁶ Tribunal, www.nntt.gov.au/cgi-bin/print_version/print_version.pl?conf=conf.xml&file=/media/1102039711476.html at 7 January 2005.

Appendix 7: Map showing NTRB regions



Appendix 8: Pilot programs – student placements and Rio Tinto Scholarships

1. NTRB student placement program, summer 2004-2005

Background

During research conducted as part of the Project, it became apparent that NTRBs face serious difficulties in recruiting lawyers. Lack of awareness among law students of the opportunities for work in the NTRB system is one factor contributing to low application rates. In response to concerns about this expressed by NTRB managers and lawyers and given the crying need for assistance with legal tasks at many NTRBs, the Project Team explored the value of an NTRB student placement program.

Initially, there was some concern that the students may be more of a burden than a help. However, once specific features were introduced into the proposed program to minimise the burden of supervision on NTRBs (as described below), NTRB managers and lawyers expressed enthusiasm for a pilot program. Nine NTRBs (Cape York, Carpentaria, CLC, Central Queensland, Goldfields, NLC, NSW NTS, SWALSC and NTS Victoria) agreed to participate by taking students.

Eighteen students were placed during the 2004/05 summer period. Information on these placements, including feedback from participating NTRBs and students, is presented below. The pilot program is continuing, with arrangements for 2005 winter placements well underway. Already, 65 applications for placements during June and July 2005 have been received,³⁵⁷ with two weeks still to go before the application period closes.

Application process

The Project Team promoted the summer placement opportunities to law students through distribution of information pamphlets, giving presentations to law students, and by involving students who had some experience with NTRBs in promotion activities. By the closing date, applications had been received by over 60 students from the Australian National University, Monash University, the University of Melbourne and the University of New South Wales.

Following a selection process that considered applicants' academic records, exposure to native title law and suitability for NTRB work, 18 students were selected for placements at nine NTRBs as well as one other organisation involved in related work (the Cape York Institute for Policy and Leadership). The students were placed for periods of between four and six weeks.

In addition to the selection process that ensured that only talented, committed students were chosen, participating students were also comprehensively briefed by the Project Team about their roles and responsibilities and provided with continued monitoring and support throughout the placement period, to minimise the burden on their NTRB supervisors.

³⁵⁷ Applications have been received from students at the Australian National University, Flinders University, Monash University, the University of Melbourne, the University of New South Wales, the University of Sydney and the University of Technology Sydney.

Students' tasks and roles

The students were engaged in a wide variety of practical legal research and drafting tasks including:

- analysing witness transcripts
- assisting in the co-ordination of witness evidence for native title claims
- commenting on existing and proposed legislation
- drafting court affidavits and preparing other court documents
- drafting pro forma questions for statements/gathering evidence from witnesses
- drafting proposals for welfare reform
- drafting protocols for visitors entering Aboriginal land
- drafting taxation advice for Aboriginal corporations
- preparing guidelines on native title law and the rules of evidence for non-legal staff
- preparing summaries of anthropological texts admitted as evidence
- research into pro forma native title agreements
- researching case law
- researching options for welfare reform
- researching the impact of developments in international intellectual and cultural property law, and
- researching the types of compensation agreements entered into with mining companies.

In relation to these tasks, many students had the opportunity to attend client meetings 'on country', workshops with senior counsel and mediation sessions.

NTRBs' feedback

NTRBs were unanimous in their views on the success of the placements and in their willingness to participate in future student placement programs. Each participating NTRB found their intern(s) to be very capable and able to contribute productively to the host organisations.

Most supervisors noted the high quality of interns' work and the little supervision they required. Supervisors commonly reported that the students represented a valuable extra resource in the NTRB. The appropriate delegation of discrete tasks to students meant that certain matters progressed more efficiently and lawyers were able to concentrate on the more complex aspects of their workloads. Moreover, as one supervisor commented, "the workplace also benefited from the enthusiasm, humour and energy of the interns".

Even those who were sceptical at first ultimately saw value in the program. For example, one supervisor had noted that, "[p]rior to the students arriving I was a little concerned at the prospect of finding enough work for two students letting alone getting on with my own tasks" however went on to say that "[d]uring [the placements] it became apparent to me that the students were well able to take on any other tasks that I might allocate to them". Overall, the supervisor "consider[ed] that the placement was a success" and "support[s] the idea of continuing with [the] program".

Students' feedback

All students found their placements interesting, enjoyable and intellectually stimulating. The students reported that the placements offered them an opportunity to acquire and

develop a range of legal and personal skills. Students gained knowledge of the process of a native title claim in its entirety, including the breadth of casework required in the preparation of claims and the role of non-legal professionals, such as anthropologists, in this process. Most students indicated that what was particularly beneficial about their internship was that they were exposed to native title law in the context of working closely with Indigenous communities. This gave them the opportunity to develop a range of cross-cultural communication skills and experience first-hand the interface between the law and the impact it has on these communities.

The following comments were received as part of student feedback on their placement experiences:

- “every day I was confronted with challenging legal predicaments that cut across areas related to trusts, contracts, property law, environmental law and administrative law”
- “the experience was thoroughly worthwhile and is highly recommended”
- “it was exhilarating”
- “the work is exciting, challenging and diverse”
- “the work was diverse and...very interesting”
- “[it was] an invaluable experience in revealing both the challenges and rewards of working in a NTRB”, and
- “it was a rewarding experience”.

Most students commented positively on the support and direction they received from their supervisors and others in the organisations,³⁵⁸ however heavy workloads and travel demands did have an impact on some students.³⁵⁹

In addition to an understanding of native title law and practice, students also experienced first-hand the challenges NTRB lawyers face in performing their functions, with comments noting communication difficulties, under-resourcing,³⁶⁰ limited access to research resources and high staff turnover leading to difficulties with information management. Students also gained insight into broader issues affecting native title claimants and Indigenous communities more generally.³⁶¹

Career promotion

In addition to the short-term benefit of the research and other tasks the students were able to undertake, the placements were successful in achieving the longer-term benefit of promoting interest in work in the native title field. Many students indicated that, as a result of their internship, they would consider the possibility of a career as an NTRB lawyer in the

³⁵⁸ Feedback indicating this included the following comments: “I have been very well supported...and have therefore never felt overwhelmed”; “there was never a shortage of activities to complete”; and “the passion and commitment they brought to their work was inspiring”.

³⁵⁹ One student commented that because the lawyers “are often away or work part-time or are very busy... I did not have a permanent lawyer contact” and as a result “did not have enough work to fill my eight-hour days”.

³⁶⁰ One student commented that “some days it was extremely disheartening to think that the fulfilment of Indigenous communities’ aspirations...was contingent upon the work of an under-funded representative body”.

³⁶¹ For example, one student wrote, “I was shocked by some of the things I witnessed... the health crisis... issues of substance abuse, violence and premature death”. Another noted “the imperfect attempt to recognise Indigenous laws and customs within our Anglo-Australian legal system” and others referred to the “dysfunctional native title process”.

future, and would encourage others to apply for internships in the wake of their own positive experiences. Others noted that their first-hand experience gave them an appreciation of the complexities involved in NTRB work, suggesting that, whether pursuing careers within the NTRB system or not, these future decision-makers will have an appreciation for the role of NTRBs in the native title system and the nature of their workloads.

The types of comments received on this are as follows:

- “I am now aware of an interesting and exciting career path that had previously escaped my attention, and I would not hesitate to draw other people’s attention to it too”
- “based on my experience throughout February I would definitely consider a career in a Rep Body after completing at least one year in a law firm”
- “it furthered my interest in the area, and led me to seriously contemplate work in the field, either from a policy or a legal perspective”
- “the prospect of working in native title following the completion of my studies is one that I would certainly consider”
- “as a graduate law student, [the placement] gave me the opportunity to reconnect with the working environment – to remember why I am subjecting myself to countless hours of reading and study”, and
- “this internship has opened my eyes to an alternative pathway which is extremely inviting”.

Suggestions for future improvements to the program

Some general suggestions that were made for the improvement of the program were:

- advance preparation by each NTRB of a list of research topics and tasks to be completed by interns
- introductory pre-departure training or materials for interns³⁶²
- introduction seminars at host NTRBs³⁶³ and in introducing them to the work conducted by the NTRB, and
- ensuring students are involved in the various activities of NTRBs (for example, attending court, meetings, regional offices and ‘on country’ locations).

³⁶² These sessions should include information that ensures students understand that:

- there is no uniform approach adopted by the NTRBs in relation to the placement program, and
- activities (for example ‘on country’ meetings) that students might be able to participate in will be subject to funding considerations.

³⁶³ Where these were provided supervisors reported that the seminars were effective in aiding students in their adjustment to working in an NTRB legal environment.

2. Rio Tinto NTRB lawyer scholarship

In response to consistent calls from NTRB lawyers for improved training in relation to mining negotiations, the Project Team initiated discussions with Rio Tinto around the possibility of the company providing scholarships for NTRB lawyers to undertake top quality training in mining law and policy. Following overwhelmingly positive feedback from NTRBs on the scholarship proposal, arrangements were finalised in September 2004 for two scholarships for study of a one-year Masters in International Mining Law and Policy at the Centre for Energy, Petroleum and Mineral Law and Policy at the University of Dundee, Scotland.³⁶⁴ Rio Tinto has agreed to fund two scholarships annually.

The scholarships are open to NTRB and non-NTRB lawyers alike, who commit to working in the NTRB system for a minimum of two years following completion of the course in Scotland. A selection committee was established (comprising Professor Marcia Langton of the University of Melbourne, Professor Lynette Russell of Monash University and Danny Gilbert of Gilbert + Tobin) to consider applications and select the successful candidates. In spite of a very short timeframe (in order that the first of the scholarships could be available for 2005), 16 applications were received and 5 candidates were interviewed. The first two scholars under the program – James Nugent of CLC and Rhonda Jacobsen of NSW NTS – departed for Dundee in early January 2005.

³⁶⁴ The Centre for Energy, Petroleum and Mineral Law and Policy was established in 1977 and is now regarded as one of the leading graduate institutions in teaching and research in natural resources, energy and the environment. There are currently more than 250 postgraduate students from over 50 countries studying at the CEPMLP and 90 honorary staff from leading energy law firms and academia.

Appendix 9: Issues relating to recruitment of Indigenous lawyers into the NTRB system

While more than 50% of all NTRB staff are of Aboriginal and/or Torres Strait Islander descent,³⁶⁵ this proportion is not reflected in the profile of NTRB lawyers. As at 31 December 2004, only five of the 76 lawyers (7%) in the system were of Aboriginal and/or Torres Strait Islander descent and none of these lawyers held the position of principal legal officer.

Although the proportion of Indigenous NTRB lawyers exceeds the proportion of people of Aboriginal and/or Torres Strait Islander descent in the general population (which is around 2.2%),³⁶⁶ the rate is nevertheless considered to be low. This consideration is made on the basis that (a) there should be less discrepancy between the proportions of professional and non-professional Indigenous staff at NTRBs, and (b) that NTRBs should be mostly staffed by Indigenous persons given that they provide services to Indigenous people.

The relatively low number of Indigenous lawyers in the system is broadly attributable to two factors:

- low rates of interest by Indigenous law graduates in entering the native title field, and
- low numbers of Indigenous law students and graduates.

Factors limiting the number of Indigenous law students and graduates can be broadly categorised as follows:

- low numbers of Indigenous students completing secondary education (as a result of low literacy and numeracy rates as well as other reasons)
- low numbers of Indigenous people undertaking tertiary education generally
- low completion rates for Indigenous tertiary students, and
- a lack of desire by Indigenous students to study law.

Low numbers of Indigenous people undertaking tertiary legal education

Although levels of Indigenous education at the school level, and general rates of Indigenous tertiary education participation, have been a topic of substantial research,³⁶⁷ the numbers of Indigenous students undertaking law degrees and the preferred career paths of these students upon graduation has received relatively little attention. It was reported that in 2000 there were 256 Indigenous undergraduate students studying Bachelor of Laws (LLB) in all Australian universities, a significant increase from the 1990 figure of 50.³⁶⁸ However, research undertaken by this Project has indicated that the number of Indigenous students enrolled in law degrees throughout Australian universities is still relatively low. These numbers are shown in Table AP9 below.³⁶⁹ Overall in 2004, 1.2% of law students enrolled at Australian universities were Indigenous.

³⁶⁵ See n. 145 above.

³⁶⁶ Australian Bureau of Statistics, Census 2001.

³⁶⁷ L De Bortoli and J Cresswell, *Australia's Indigenous Students in PISA 2000: Results from an International Study*, Australian Council for Educational Research (2004); M Long, T Frigo and M Batten, *The School to Work Transition of Indigenous Australians: A Review of the Literature and Statistical Analysis* (1998) p 15; S Mellor and M Corrigan, *The Case for Change: A Review of Contemporary Research on Indigenous Education Outcomes*, Australian Council for Educational Research (2004).

³⁶⁸ H Douglas, 'The Participation of Indigenous Australians in Legal Education 1991–2000' (2001) 8 *University of New South Wales Law Journal*.

³⁶⁹ Figures presented in the table were obtained through personal communication with each of the 28 Australian law schools between November 2004 and March 2005 (this included providing the Dean of each law school with the opportunity to verify the figures).

Replacement Table AP9: Total number of students and number of Indigenous students enrolled in law at Australian universities

University	State	Total number students enrolled in law in 2004	Number Indigenous students enrolled in law in 2004	Indigenous students as a % of total law students in 2004	Indigenous population as a % of total by State	Total size of graduating law class in 2003	Indigenous law graduates in 2003	Indigenous students as a % of total law graduates in 2003
Macquarie University	NSW	1,500	3	0.2%		240	0	0.0%
Southern Cross University	NSW	204	6	2.9%		45	1	2.2%
University of New England	NSW	1,754	19	1.1%		149	2	1.3%
University of New South Wales	NSW	1,700	23	1.4%		284	6	2.1%
University of Newcastle	NSW	573	7	1.2%		68	0	0.0%
University of Sydney	NSW	1,500	6	0.4%		291	1	0.3%
University of Technology Sydney	NSW	1,359	21	1.5%		147	0	0.0%
University of Western Sydney	NSW	1,814	5	0.3%		166	0	0.0%
University of Wollongong	NSW	760	9	1.2%		67	0	0.0%
Total New South Wales		11,164	99	0.9%	1.90%	1,457	10	0.7%
Deakin University	VIC	1,071	34	3.2%		152	4	2.6%
LaTrobe University	VIC	866	2	0.2%		108	0	0.0%
Monash University	VIC	2,660	4	0.2%		661	1	0.2%
University of Melbourne	VIC	2,087	11	0.5%		324	1	0.3%
Victoria University	VIC	448	1	0.2%		7	0	0.0%
Total Victoria		7,132	52	0.7%	0.54%	1,252	6	0.5%
Bond University	QLD	388	1	0.3%		95	0	0.0%
Griffith Law School	QLD	968	35	3.6%		156	1	0.6%
James Cook University	QLD	1,119	15	1.3%		71	1	1.4%
Queensland University of Technology	QLD	2,455	32	1.3%		335	2	0.6%
University of Queensland	QLD	1,487	8	0.5%		106	0	0.0%
Total Queensland		6,417	91	1.4%	3.15%	763	4	0.5%
Adelaide University	SA	1,341	14	1.0%		207	0	0.0%
Flinders University	SA	750	10	1.3%		132	3	2.3%
Total South Australia		2,091	24	1.1%	1.61%	339	3	0.9%
Murdoch University	WA	727	16	2.2%		101	0	0.0%
Notre Dame University	WA	472	0	0.0%		76	0	0.0%
University of Western Australia	WA	1,300	29	2.2%		169	4	2.4%
Total Western Australia		2,499	45	1.8%	3.19%	346	4	1.2%
University of Tasmania	TAS	669	5	0.7%		137	2	1.5%
Total Tasmania		669	5	0.7%	3.47%	137	2	1.5%
Australian National University	ACT	1,400	27	1.9%		198	6	3.0%
University of Canberra	ACT	157	4	2.5%		65	0	0.0%
Total Australian Capital Territory		1,557	31	2.0%	1.16%	263	6	2.3%
Charles Darwin University	NT	323	22	6.8%		36	1	2.8%
Total Northern Territory		323	22	6.8%	25.05%	36	1	2.8%
National total		31,852	362	1.2%	2.18%	4,520	36	0.8%

More generally, although studies have shown that the proportion of Indigenous students enrolling in tertiary education is increasing, in 1999 Indigenous students made up only 1.8% of higher education commencements.³⁷⁰ Of even greater concern is the low retention rate for Indigenous tertiary students, particularly those enrolled in law. A study conducted in 1990 estimated that a 75% attrition rate was common among Indigenous law students in Australia.³⁷¹ More recent figures indicate that the 'withdrawal rate' of Indigenous law students at the Australian National University had fallen from 72% in 1991 to 28% in 1999. This may be indicative of an improved retention rate for Indigenous law students; however, the statistics are still alarming.³⁷² Our investigations for this Project indicate that 36 of the 4,593 law students (or 0.8%) who graduated from Australian universities in 2003 were Indigenous.

As a comparison, we obtained statistics for each of the five law schools in New Zealand.³⁷³ In New Zealand, where 14.7% of the total population is Indigenous,³⁷⁴ 10.6% of law enrolments in 2004 (723 of 6,810) were of Indigenous students,³⁷⁵ and 11.7% of completions in 2003 (100 of 853) were Indigenous.³⁷⁶ Although obviously the numbers are not directly comparable as they deal with different years and the sample size is small (and therefore more sensitive to fluctuations), the trend is of concern. It would appear that the relative proportions of Indigenous enrolments (1.2%) and graduations (0.8%) in Australia are approximately half the proportion in the wider population (2.2% of all Australians are Indigenous). In contrast, the respective rates in New Zealand are much closer – 10.6% of enrolments, 11.7% of graduations and 14.7% of total population.

A better way to appreciate the significance of this is to see how many Indigenous law students would have been enrolled at and graduated from Australian law schools if Australia had the same level of Indigenous participation in legal education as New Zealand. According to the 2001 Census in New Zealand, the Maori population was 526,281. In the

³⁷⁰ This was an increase from the 1989 level of 1% (Department of Education, Science and Training, *Learning for All: Opportunities for Indigenous Australians* (2004), www.dest.gov.au/archive/iae/analysis/_learning/1/index.htm at 6 December 2004. See also S Mellor and M Corrigan, *The Case for Change: A Review of Contemporary Research on Indigenous Education Outcomes*, Australian Council for Educational Research (2004) citing the figures for improvements in enrolment of Indigenous students in university programs between 1992 and 200: enrolments in higher degrees rose from 153 to 433; enrolments in postgraduate programs rose from 191 to 283; and in Bachelor Degree programs the increase was from 2,780 to 4,629.

³⁷¹ D Lavery, 'The Participation of Indigenous Australians in Legal Education' (1993) 177(4) *Legal Education Review*.

³⁷² H Douglas, 'The Participation of Indigenous Australians in Legal Education 1991–2000' (2001) 8 *University of New South Wales Law Journal*.

³⁷³ The five schools are Victoria University of Wellington, University of Waikato, University of Otago, University of Auckland and University of Canterbury.

³⁷⁴ Of the total population of New Zealand (3,586,731), 526,281 are from the Maori ethnic group (Statistics New Zealand, *2001 Census of population and dwellings – cultural diversity tables*, Tables 8, www.stats.govt.nz/NR/rdonlyres/01625D00-446C-4748-8FDE-37C1AE5C443F/0/CulturalTable8.xls at 1 April 2005).

³⁷⁵ At the Victoria University of Wellington, 201 of the 1,804 students enrolled in law in 2004 were of Maori ethnicity; at the University of Waikato, 197 of 734 were Maori; at the University of Otago, 89 of 1,402 were Maori; at the University of Auckland, 183 of 1,826 were Maori; and at the University of Canterbury, 53 of 1,044 were Maori.

³⁷⁶ At the Victoria University of Wellington, 17 of the 196 law completions in 2003 were by Maori students; at the University of Waikato, 31 of 106 were Maori; at the University of Otago, 17 of 172 were Maori; at the University of Auckland, 29 of 267 were Maori; and at the University of Canterbury, 6 of 112 were Maori.

same year, the Census in Australia indicated an Indigenous population of 410,006. Thus, Australia's Indigenous population is 78% of the size of New Zealand's Maori population.

In 2004, 723 Maori students enrolled in law in New Zealand. If Australian Indigenous enrolments were at 78% of the New Zealand figure, there would have been 563 enrolments rather than the 369 actual enrolments. That is, there would have been 194 more Indigenous students enrolled in law at Australian universities, an increase of 53% on actual 2004 enrolments.

In relation to graduations, the difference is even more stark. In 2003, 100 Maori students graduated in law in New Zealand. If Australian Indigenous graduations were at 78% of this figure, there would have been more than double the number of Australian Indigenous law graduates in 2003 – the number increasing from 36 to 78.

Even though these numbers are indicative only, given the small sample size and the many differences between Indigenous communities in Australia and New Zealand, they call into question the success of current attempts in Australia to increase Indigenous enrolment and to reduce Indigenous attrition rates. Clearly, more detailed research and further systematic analysis is required into age distributions,³⁷⁷ how enrolment and graduation patterns have fluctuated over time and into such measures as average length of time to graduate, pass rates in core courses, comparisons of the market for lawyers, and positive discrimination programs.

Low numbers of Indigenous students completing secondary education

Studies have shown that Indigenous students are disproportionately more likely to leave school early, as the following statistics indicate:

- 31% of Indigenous 17 year olds are in school, compared with 60% of total Australians of that age
- 57% of Indigenous 16 year olds are in school, compared with 80% of total Australians of that age, and
- 81% of Indigenous 15 year olds are in school, compared with 92% of total Australians of that age.³⁷⁸

Low literacy and numeracy rates for Indigenous students

According to 2000 and 2003 studies of 15 year old students, conducted by the OECD (Organisation for Economic Cooperation and Development) Programme for International Student Assessment ('PISA'), Australia's Indigenous students perform at a significantly lower level than Australian non-Indigenous students in the areas of reading literacy, mathematical literacy and scientific literacy. In both those years, Australia's Indigenous

³⁷⁷ It is interesting to note that in Australia 39% of the Indigenous population is less than 15 years old (Australian Bureau of Statistics, *National Aboriginal and Torres Strait Islander Social Survey 2002*, Catalogue No. 4714.0, <http://www.abs.gov.au/ausstats/abs@.nsf/b06660592430724fca2568b5007b8619/ad174bbf36ba93a2ca256ebb007981ba!OpenDocument>). In New Zealand, the comparable figure is 37% (Statistics New Zealand, *2001 Census: Maori – reference report*, Table 3, www.stats.govt.nz/NR/rdonlyres/8166DC09-9792-4553-9617-3DD064A50BF0/0/Table3.xls at 1 April 2005).

³⁷⁸ M Long, T Frigo and M Batten, *The School to Work Transition of Indigenous Australians: A Review of the Literature and Statistical Analysis* (1998).

students achieved results that were well below the OECD average.³⁷⁹ Analysis of the PISA statistics shows that while Australian students overall were ranked second out of the 41 participating countries, Indigenous students' results gave them a ranking of 33 (ahead of only eight countries).³⁸⁰

Other factors affecting Indigenous students' desire to study law or enter native title field

In addition, or sometimes contributing, to the educational retention and performance issues set out above, there are also socio-political and cultural factors affecting the involvement of Indigenous people in tertiary education (including law) and in careers in the field of native title. These are complex matters that go well beyond the scope of this Project. These issues were not explored during interviews conducted as part of the Project and accordingly the Project Team is not qualified to detail the nature of such issues or assess their relevance to the NTRB system.

Nevertheless, it should be noted that some participants in the interview process did comment on these types of issues. A number referred to the difficulties that a career in native title presents for Indigenous lawyers, and suggested that these obstacles may act as deterrents to Indigenous people who consider entering the system. The difficulties identified included: the pressures of community expectations; the potential inability to distance oneself from intra-Indigenous disputes; and concerns about being 'pigeon-holed' as an Indigenous person.

Possible strategies

For many reasons not necessarily related to the objective of this Project, the goal of increasing the number of Indigenous lawyers in the NTRB system is important and laudable. Any strategies implemented to achieve this aim will need to be mindful of the economic, political, cultural and personal factors that may present barriers to its immediate realisation. The information provided in this appendix is intended as an overview of the types of issues that will need to be considered in the development of such strategies for encouraging and supporting greater numbers of Indigenous people to enter the NTRB system.

³⁷⁹ Although no comparative analysis of the educational levels of Indigenous and non-Indigenous students has yet been conducted for the results of PISA 2003, a 2004 report shows that the mean score of Indigenous Australians in reading literacy, mathematical literacy and scientific literacy was again below the OECD average. Meanwhile, the mean scores for non-Indigenous students again placed Australia within the top-five ranking OECD countries (S Thomson, J Cresswell and L De Bortoli, *Facing the Future: A Focus on Mathematical Literacy Among Australian 15-year-old Students in PISA 2003*, OECD and Australian Council for Educational Research (2004)).

³⁸⁰ L De Bortoli and J Cresswell J, *Australia's Indigenous Students in PISA 2000: Results from an International Study*, Australian Council for Educational Research (2004) pp 5-7. The eight countries were Peru, Albania, Indonesia, Macedonia, Brazil, Chile, Argentina and Mexico.

A recent initiative designed to improve Indigenous educational outcomes is the Yachad Accelerated Learning Project. The project, led by Professor Marcia Langton of the University of Melbourne and Dr Zane Ma Rhea of Monash University, is modeled on Israeli pioneered programs to combat patterns of educational disadvantage through accelerated learning, empowerment and community involvement, rather than conventional remedial approaches. (Indigenous Stock Exchange, 'Introducing Yachad: Accelerating Better Future for Indigenous Young People!', *Media Release*, www.isx.org.au/news/media/Yachad.html at 1 April 2005).

Examples of the types of strategies that might be worthwhile exploring include:

- running a pilot study at one university that focuses on encouraging Indigenous students to get involved in native title through utilising existing Indigenous networks
- establishing extensive, long-term support networks for Indigenous students to provide support in academic pursuits and to provide advice, and
- offering scholarships for one or two years of law study to Indigenous students who commit to working in the NTRB system for a minimum period.