

FaCSIA Draft Guidelines for support of PBCs  
Cape York Land Council Submission  
8 June 2007



### Introduction

The Cape York Land Council (CYLC) is an Aboriginal Corporation serving the Aboriginal communities and traditional owners of Cape York Peninsula. Membership of the Land Council is open to Aboriginal people whose traditional lands are on Cape York Peninsula. CYLC is also the Cape York Native title Representative Aboriginal/Torres Strait Islander Body for the purpose of the *Native Title Act 1993* (Cth) (NTA).

CYLC is encouraged by the Commonwealth's acknowledgement that PBCs require funding support to perform its functions. However we have a number of key concerns with the policy framework including that the scope of the assistance is not broad enough, that it is flawed due to excluding the option of self determination for PBCs to independently seek funding, that the Government is shifting its responsibility for monitoring PBC compliance to NTRBs and that there has been a failure to acknowledge in the draft policy the significant resource requirements that this process could generate for NTRBs, despite FaCSIA being fully aware of the difficult circumstances NTRBS operate in.

### Policy and Legislative Framework

#### *PBC Legislative Framework*

We suggest that under "PBCs have functions and obligations under:" reference should also be made to :-

- possible functions under other Commonwealth, State or Territory legislation;
- possible cultural heritage functions under State or Territory legislation

CYLC submits that there may well be a high degree of overlap between activities that relate to cultural heritage and activities that relate to native title. Additionally, the cultural heritage regime in Queensland is closely linked to the native title system. At present, the Queensland government offers little or no financial assistance for cultural heritage activities, yet PBCs in the State of Queensland are identified as relevant native title parties and Aboriginal parties for the purposes of the Aboriginal Cultural Heritage Act 2003 (Qld).

In relation to the section on "community expectations" we seek inclusion of economic development. There should be reference to a community expectation (both

indigenous and non-indigenous) that PBCs will play an active role in social, economic, cultural development and environmental protection. Although it is anticipated that cultural development will be the primary business of the communal PBC, there will be expectations of involvement in enterprise development and social development even if limited to the extent of facilitating engagement with the public, private and philanthropic sectors.

### *Policy framework for PBC funding*

We note that most PBCs will be classified as small corporations under the CATSI Act, such that they will only have to provide a minimum “general” report containing basic corporate details and not including audited financial statements, every 2nd year rather than annually, and will also be able to apply to ORAC to hold AGMs every 2 years.

CYLC submits that for those existing PBCs, there is a real likelihood that the vast majority of them have not had the capacity to meet their regulatory compliance obligations since possibly the holding of their first AGM, which will mean that significant work will need to be undertaken, most likely by NTRBs, to satisfactorily address outstanding regulatory compliance issues let alone focus on upcoming or new obligations.

We submit that the Commonwealth should provide a guarantee of minimum seed funding for all PBCs.

### **Funding applications**

We refer to the proposal for applications to be made by the NTRB for PBC area, unless there are “exceptional circumstances” in which case PBC can seek approval to apply directly.

The process of pursuing funding applications will increase pressures on NTRBs in circumstances where we are already struggling to cope with high workloads and limited resources. CYLC submits that it will be necessary to provide additional funding to NTRBs to allow them to participate in the PBC funding application process. For example, training of financial staff in relation to traditional owner engagement in a culturally appropriate way; training of financial staff in conflict resolution; training of field officers and lawyers on strategic planning and funding submissions; or engagement of new staff to work in these roles and their subsequent integration into the staffing structure.

It would also place additional pressure on NTRBs to undertake detailed consultations with the Governing Committees of existing PBCs and their members and native title holders to gain a greater understanding of their likely funding requirements, for which NTRBs are not presently resourced. This obligation will be significant for those NTRBs that have an increasing number of PBCs in their representative body area.

Through shifting compliance obligations from the Commonwealth to the NTRBs the Commonwealth is setting the stage for conflicts between Indigenous groups and Indigenous organisations. Many PBCs will find it astounding that after long, costly

struggles for recognition of native title rights and reclaiming their rights to be in control and have a say over their land, that they are required to hand back their responsibility for managing country, by handing over the purse strings to NTRBs. We acknowledge that it may be a desirable course of action for some PBCs in their infant years of operation to go through NTRBs. However each PBC will be in different circumstances and will wish to make their own decisions and not have decisions taken away from them again by Government policy. It seems that this policy direction is more for the Government's administrative ease than ensuring the protection and respect of native title rights and interests.

For NTRBs to responsibly monitor the acquittal of funds they will be required to maintain close relationships with PBCs, requiring ongoing resource commitment. This again could be the source of tension within Indigenous groups as native title holders who have yet to secure recognition will see NTRB resources still be committed to those groups who have succeeded. Therefore an additional allocation of funds should be provided to NTRBs to ensure first generation and second generation native title issues are given the required attention.

#### **A. Assessment Process**

##### ***Criteria***

We refer to the criteria (b) "Whether funding for PBCs' administrative costs has been sought or received from other sources".

The reality is that at least initially, it is unlikely that most PBCs will have the expertise to identify and pursue other funding sources. It will be necessary either for NTRBs to undertake those enquiries on their behalf or, we believe more appropriately, for FaCSIA to provide operational funding for the initial year of operation without any strict requirements for proof of efforts to obtain funding from other sources. We submit therefore that this criteria should be amended to require information about funding for administrative costs which has been received or which is available from other sources - i.e. so that there is no over-riding obligation to actively seek such funding, at least for the first year of operation.

A funded position within NTRBs for a full-time submission writer or 'PBC' would address the current shortfall of resources for claim groups and NTRBs, which risks becoming a greater shortfall if additional fund-seeking obligations are placed on NTRBs. An alternative would be a 'submission-writing house' for several claim groups or NTRBs to source expertise and resources.

There is very limited capacity for PBCs to identify and pursue other funding sources. This may be increased having regard to the level and type of future act activity in the PBC's area, but funding to respond to and negotiate agreements in relation to future acts will often be limited to ensuring that the PBC has the capacity to consult with the native title holders about native title decisions and preparing and maintaining documentation as evidence of consultation and consent. There will only be exceptional circumstances where there may be funding provided to meet regulatory compliance obligations.

We are also concerned that the general reference to “Details of funding sought/received should be provided”. This statement should be qualified so as to only refer to funding that has been sought or received for items that are subject to the funding application (administrative costs). For example, there should be no obligation for NTRBs to provide details of funding received by Developers for consultation for a future act or funding received for management planning workshop, income from commercial operations being run by the PBC. This would be far too onerous for yearly funding applications and also intrude into the private dealings of the corporation including infringing on possible commercial in confidence arrangements.

We refer to the list under (c) Whether items are eligible for funding as administrative costs”. CYLC submits that the items listed would appear likely to provide some significant improvements in the ability of PBCs to operate at a basic level. However:-

- there are likely to be continuing difficulties in circumstances where there are high levels of activity but no or limited funding assistance offered by future act proponents. We believe that it is critical that PBCs are able to access professional support, such as legal and other advice, from time to time, for matters which fall outside the ambit of NTRB assistance;
- in addition to regulatory compliance obligations, there is a need for funding to extend to accounting and financial planning advice, particularly in relation to the preparation and lodgement of income tax returns and the seeking of GST registration and relevant tax exemptions that PBCs may need to pursue. For those PBCs that have not had any basic level of funding to address minimum regulatory financial obligations, there could be potential exposure to late lodgement penalties when these are ultimately addressed;
- CYLC considers that the financial situations of PBCs within their first year of operations make it difficult for the corporations to develop strategic financial and land management plans against which the benefit of funding activities may be assessed. CYLC submits that specific funding be made available to PBC's to assist them to develop strategic plans for a certain period of time within their first year of operation. The allocation of funding for this purpose would necessarily be on a case by case basis and would depend on geographical, financial and other factors that are specific to the circumstances of the PBC.
- it is likely that all PBCs will require some level of office staffing, even if it is a part-time position;
- it will be difficult in most circumstances to identify whether competent and experienced staff are available before availability of funding has been confirmed;
- as with our comment above in relation to availability of funding generally, it will be difficult for PBCs to explore other avenues for funding for staff in the initial year of operation. A commitment to provision of funding for an office staff member for at least one year would provide potential for such investigations to be carried out.
- governance training for Governing Committee members and, to a lesser extent, capacity building costs, are important items for which specific allowances should be made. Although it is noted that the

Office of the Registrar of Aboriginal Corporations has programs that can assist with these matters, the capacity for ORAC to deliver these programs to members in remote indigenous communities is limited and needs to be extended to cover training in relation to the PBC's obligations under the NTA, PBC Regulations and ILUA Regulations. We also note that ORAC has confirmed to CYLC they will provide some training however they will not assist with any costs associated with travel for PBC members or staff to attend such training.

- There should be provision for funding applications to include other capital investments (computers, GIS mapping equipment, GPS) to allow PBCs to perform functions.

The policy should also include flexible in that funding should be able be secured prior to formal establishment of the PBC in specific circumstances. For example, having an appointed, employed Executive Officer during the establishment period, the few months leading up to the formal creation of the PBC, would significantly increase the likelihood of having a fully functioning corporate structure with effective policies and planning in place from the outset. If sufficiently resourced and trained, such an employee would be able to co-ordinate submission writing to seek funding for the PBC's.

In relation to d) "whether costs of reporting and meeting obligations have been kept to a minimum", CYLC notes that the very short period of time provided for comment on the draft guidelines means that we have not been able to seek input from the existing PBCs within our NTRB area. We are therefore unable to comment on the appropriateness of this provision, and do not have information that would enable us to assess which of the categories of the CATSI Act are likely to apply to existing or proposed PBCs for the CYLC NTRB area.

CYLC also notes that, in a perfect world, it would be preferable to keep reporting and meeting obligations to a minimum, however, this will very much depend on the size of the PBC's membership and the native title holding group, the group's diaspora and the minimum quorum requirements for annual general meetings. It also assumes a level of technological capacity, such as teleconferencing and videoconferencing facilities, that are not widely available in many remote indigenous communities and often may be inappropriate when holding Governing Committee meetings to consider resolutions for the PBC to enter into agreements to confirm particular native title decisions. The absence of any funding for many years to enable PBCs to meet basic regulatory compliance obligations will also inevitably mean that significant work will be required to satisfactorily address outstanding regulatory compliance issues.

We note that each Period of funding is proposed to be not for more than 1 financial year. CYLC submits that this should be flexible and longer funding periods be possible in certain circumstances. For example cost savings can be achieved with long term leasing of computers or phones, or where financial planning advice supports a longer funding cycle. We note too that the complete range of ILUA obligations triggered by native title holding may arise after the initial 12 months of PBC operation.

In relation to "Reviews" CYLC believes that there should also be an external review process available.

## **B. Applications from NTRBs**

In relation to the situation where there is an overlap of a PBC area into two or more NTRB areas, CYLC submits that the NTRB providing the funding application assistance should provide written notice of their assistance to the other overlapping NTRBs.

### *Procedures:-*

We note that CYLC has not had sufficient time to consider the specific procedures and organisational impacts of this new process. Over the coming months we will be reviewing these issues and preparing internal policy. We will therefore provide further comment on this at a later date. As noted earlier we believe there are significant issues to consider relating to liability, compliance and risk management regarding the requirement to report on and account for the Native Title Program Funding for PBCs.

## **C. Applications direct from PBCs**

We note that PBCs need to explain the reasons for seeking direct funding and some examples have been included. We submit that some positive examples should also be included in this list. For example that the PBC can demonstrate good governance.

We also suggest that FaCSIA notify NTBCs of any exemption granted.

### **Other issues**

CYLC submits that FaCSIA should also approach other government programs and policies to ensure they make provisions for the funding to PBCs, for example Shared Responsibility Agreements (SRAs) and that this policy should acknowledge that funding beyond the scope of this policy may be possible if agreed through SRA or other similar type agreements with Governments.

We also submit that the PBC regulations in relation to what services PBCs can charge for needs to be broader to supplement the limited funding available through this policy. Native Title holders (PBC) consent is just another cost of developing land. Native title holders should not be expected to absorb these costs as it will be at the expense of the positive promotion, and personal and communal enjoyment, of their native title rights and interests.