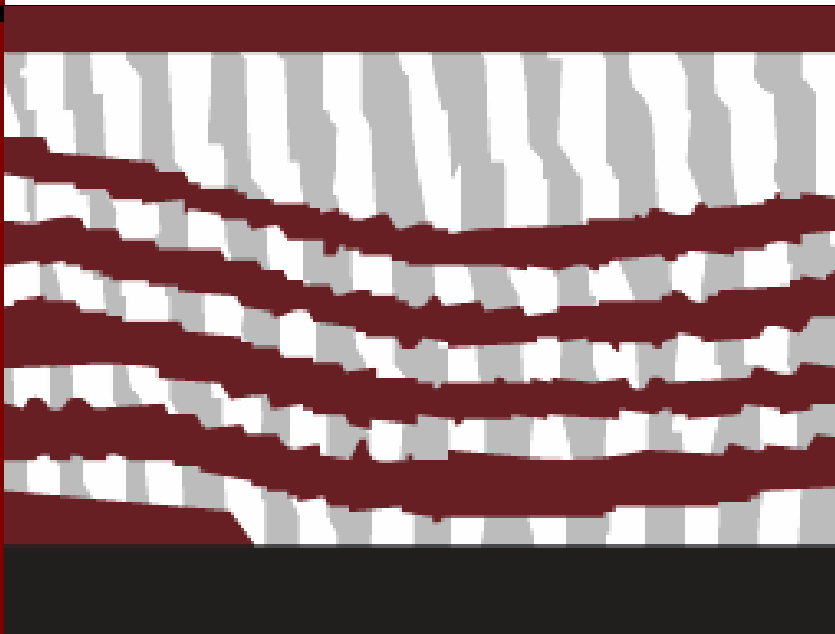


Summary of responses arising from
NTRU PBC workshops to FaCSIA
guidelines for supporting PBCs



Native title Research Unit

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AIATSIS
Australian Institute of Aboriginal
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Introduction

With the support of the FaCSIA Land Branch, the Native Title Research Unit at the Australian Institute of Aboriginal and Torres Strait Islander Studies has embarked on a research and resource project to develop greater understanding of the Prescribed Bodies Corporate (PBC) environment and native title holder aspirations and to bring together resources and develop networks that may benefit them.

As a part of this Project, the NTRU has held three workshops/meetings at which native title reforms concerning PBCs and issues concerning the provision of support to PBCs were discussed.

The workshops/meetings were:

- Native Title Representative Bodies PBC workshop involving staff of NTRBs and NTSPs who have been or will be involved in the design and establishment of PBCs, 5-6 December 2006, Canberra;
- the first national meeting of members of Prescribed Bodies Corporate, 11 - 13 April 2007, Canberra; and
- a PBC workshop at the Native Title Conference on the NTRB/NTSP-only day, 6 June 2007, Cairns.

Discussions relating to the provision of support for PBCs at the NTRB PBC workshop and at the national PBC meeting were led by Mr Greg Roche, Assistant Secretary, Land Branch FaCSIA. FaCSIA's draft document, 'Draft Guidelines for support of PBCs', which were circulated for comment subsequent to the workshop and the meeting was considered at a PBC workshop facilitated by NTRU staff on the NTRB/NTSP-only day at the 2007 Native Title Conference in Cairns.

This document summarises commonly-held views expressed by participants at these workshops/meetings and which are provided in greater detail in the reports on the NTRB PBC workshop and the PBC national meeting.¹

¹ Strelein, L. and T. Tran 2007 *Native title Representative Bodies and Prescribed Bodies Corporate: native title in a post determination environment*. Native Title Research Report No2/2007. NTRU, AIATSIS.

Bauman, T. and T. Tran 2007 *First National Prescribed Bodies Corporate Meeting, Canberra 11-13 April 2007: issues and outcomes*. NTRU, AIATSIS.

1. General Policy Responses

FaCSIA's draft guidelines state that PBCs will be able to apply for limited funding mostly for administrative assistance through the Native Title Funding Programs of NTRBs and NTSPs and that NTRBs and NTSPs may assist PBCs in their day-to-day operations.

1.1 Responses to principles in the guidelines

The responses of participants to the principles of this approach which arose at the workshops and at the PBC national meeting described above are summarised below:

- There is little indication that the guidelines will provide real support to PBCs since there is no apparent additional PBC dedicated funding in FaCSIA's Native Title Funding Program at least in the near future, and FaCSIA has a clearly stated priority of funding claims processing.
- There are issues of choice, self-determination and possibly discrimination with most if not all PBCs being compelled to apply for funding through NTRBs and NTSPs when other Aboriginal organisations are not generally required to access assistance through such intermediaries.
- The guidelines appear to simply transfer Government responsibility for PBCs to NTRBs and NTSPs.
- Governments should establish direct working relationships with PBCs even if using NTRBs as intermediaries may be less burdensome for them.
- There appears to be no legal requirement for NTRBs or NTSPs to administer PBC funding on behalf of FaCSIA raising the possibility of the implications of the refusal of any NTRB or NTSP to do so.
- A number of short, medium and long term governance and representative issues require consideration since PBCs currently rely to a large extent on NTRBs in representing and advocating for their needs at local, regional and national levels. This is of concern since it is apparent that:
 - Government expects to faze out NTRBs once claims are processed in an estimated 10 to 15 years; and
 - because of policy and budgetary concerns, Government does not intend to fund PBCs in perpetuity, yet PBCs will exist in perpetuity.
- Any lack of adequate funding for post determination processes makes the claims processes meaningless.
- There are a number of other Indigenous incorporated bodies which are carrying out similar native title functions to PBCs and have similar needs but which are not recognised in the guidelines.

1.2 The relationship between NTRBs and PBCs

The following issues were raised with respect to the affects of the proposed approach to supporting PBCs on NTRBs/NTSPs and PBCs and on the relationships between them:

- the potential for reinforcing relationships of dependency between NTRBs/NTSPs and PBCs rather than fostering the autonomy and independence of the PBCs or at the very least inter-dependency with NTRBs/NTSPs via a partnership arrangement when many NTRBs and NTSPs are attempting to ‘wean’ PBCs;
- the potential for NTRBs/NTSPs to act as gatekeepers of key resources in the native title system;
- the compounding of existing uncertainties regarding overlapping roles and responsibilities of PBCs and NTRBs/NTSPs under the *Native Title Act 1993*;
- the compounding of existing uncertainties surrounding other roles and responsibilities such as the responsibility to inform PBCs about issues such as legislative changes, the recent reforms and submission time frames for funding through NTRBs;
- the existing prioritisation of claims processing means that once the PBC is established, NTRBs and NTSPs need to return to servicing claims processing and waiting claimant groups;
- the proposal will create perceptions of NTRBs and NTSPs as ‘funding bodies’ and ‘accountability police’, sets up another cycle of reporting for NTRBs and PBCs and places NTRBs in a default monitoring role;
- there is an apparent need for NTRBs and NTSPs to reallocate priorities under the proposal, but little guidance as to how this should be done;
- the proposal places an added burden on NTRBs and NTSPs which are already severely constrained because of the difficulties in attracting and retaining qualified staff, extraordinary workloads, harsh prioritisation and inadequate funding and unable to make sufficient progress in claims processing;
- NTRBs and NTSPs would be required to be administratively accountable to government for PBC funding and actions as well as their own;
- there is the potential for exclusion of PBCs by NTRBs and NTSPs from relevant decision making and consultation processes or for NTRB/NTSP interference in PBC decision making processes;
- NTRBs/NTSPs and PBCs may hold different views concerning the nature and priority of support required by particular PBCs and override PBC objectives;
- NTRBs and NTSPs may lack the expertise and/or capacity to support PBCs in their needs and PBCs may lack confidence in their ability to do so;
- unproductive and distrustful working relationships between PBCs and NTRBs or NTSPs could mean further disadvantage for a PBC dependent upon the NTRB or NTSP to represent its interests;
- NTRBs and NTSPs will effectively control PBC funding in the proposed arrangements and there is a need to develop processes of accountability and transparency in PBCs accessing funding through them;

- NTRBs acting as intermediaries can cause unnecessary delays in implementing PBC projects;
- a reshuffling resources within the system, will locate PBCs in competition with NTRBs for funding given the priority of claims processing; and
- any new policies promising funding and greater support to PBCs through NTRBs and NTSPs will increase the expectations of PBCs of them.

2. Specific responses to funding guidelines

2.1 Eligibility and prioritising

There is a need for a framework which sets out transparent and objective eligibility criteria including answers to the following questions:

- How are the ‘low’, ‘medium’ and ‘high’ Future Act activity eligibility categories which have been suggested to be specifically defined?
- How are PBC needs to be assessed? (A substantial level of activity can mean greater need. For example, Lhere Artepe, seen as a PBC of high level activity, has had to sell native title land to cover administrative costs, and apparently would not qualify for FaCSIA assistance.
- At what stage in a PBCs development can it be assisted financially? (PBCs need to be in place before a determination, and ready for Future Act activity whenever it might occur rather than being reactive).
- Who is authorised to bring a submission to the NTRB? Families? Individuals? Public Officers? Chairs? How is authority for a funding submission to be obtained?
- How are PBC activities to be defined as relevant given the difficulties in separating non-native title and native title outcomes (the specific and sometimes limited rights and interests which are identified in a determination, or the limited functions set out in the PBCs rules, may not necessarily be the key factor in determining the role and scope of the PBC as native title is used as a mechanism to achieve other goals)?;
- How will NTRBs prioritise their assistance amongst PBCs (there is a need for NTRBs to carry out an audit of PBCs in their regions and their needs and activities and for PBC strategic planning and visioning)?
- What is the formula for considering other income in assessing funding applications? Will assets be considered? (third party income may only be directed towards a particular process, not the PBC needs as a whole, and the quality of third party agreements will be highly variable).

2.2 Start-up and ongoing funding and the proposed 12 month funding

Whilst some PBCs may wish to remain dormant, many require assistance not only for their initial establishment but also in post determination processes. Negotiations and

agreement-making processes continue after determinations and agreements may be renegotiated in their course.

- Greater investment in the early stages of the PBCs evolution, careful and efficient planning, design and co-ordination and greater awareness among program delivery agencies and other potential partners can assist PBCs in ensuring that rights, interests and needs are realised.
- A standardised amount of start-up funds, scaled to PBC activities and needs are needed at least 6 months in advance of determinations.
- PBCs also need, among a range of other needs listed below, core government funding to:
 - meet their statutory functions including negotiating future acts, not only under the *NTA* but also other legislation; and
 - assist in the development of independent Indigenous enterprise.
- PBC participants were particularly concerned about one year funding cycles which make no provision for short, medium and long term planning and make it difficult to attract skilled staff.
- 12 month funding periods are often shortened by the time taken in administrating, reporting on and releasing funds.
- Ongoing funding commitments matched to milestones within specified timeframes longer than one year are required.

2.3 Administration and accountability

There is a range of administration and accountability issues which remain unclear in the guidelines including:

- Who is accountable for the expenditure of funding by PBCs?
- Who is liable for fraudulent behaviour?
- Who prepares the PBC submission?
- Will PBCs be required to disclose commercial-in-confidence agreement issues in stating other funding sources in submissions?

There is a need for a Memorandum of Understanding which sets out clear, reviewable and transparent policies for determining when support can and will be provided and for what purpose.

2.4 PBC funding requirements not mentioned in the guidelines

Specific PBC funding requirements which are not mentioned in the guidelines include the following:

- a range of technical expertise and advice which NTRBs/NTSPs are often unable to offer including business development, scientific expertise, natural resource management, legal and anthropological expertise, eco-tourism and

sustainable land management expertise, and support for mining and other agreements;

- skilled strategic and operational planning matched against resources over the short, medium and long term;
- dispute management and decision-making facilitation, mediation and negotiation expertise;
- IT support including the development of PBC web pages;
- establishment costs, not just of PBCs, but also other corporate entities;
- economic development, small business advice etc;
- legal and anthropological expertise including assistance from anthropologists to get 'tourism operating in a way that does not interfere with sacred sites';
- programs to employ members of the community within the PBC itself;
- travel expenses (eg purchasing vehicles, paying for airfares and travelling to and from training);
- meeting costs including and logistical assistance other than for AGMs;
- financial advice and other professional expertise 'to make the money grow' (Mirriung Gadjerrong for example is working with Macquarie Bank);
- capacity building programs (including mentoring) for staff;
- resources to employ skilled staff consistently (without being able to offer reasonable salaries and appropriate working conditions, PBCs will also be unable to attract staff);
- research;
- advocacy and representation at local, state and national levels and community relations work (the success of PBCs is essential to community relations and broader economic development in 'open' town and Aboriginal communities regardless of their size);
- Future Act, agreement-making assistance including negotiation and co-ordination with other agencies;
- language and culture maintenance and initiatives and setting up digital archives of cultural materials

2.5 Other funding sources

The proposal that PBCs will access assistance from the states and from other State and Commonwealth funding bodies is dependent upon a range of highly variable factors including:

- There is little likelihood that the States will be interested in assisting PBCs where the Future Act activity takes place on land of little interest to them.
- Accessing funding from other Commonwealth and State Departments is dependent upon the effectiveness of Indigenous Co-ordinating Centres and their solution brokers which are nominated by all funding bodies as 'one stop

shops' which can provide PBCs with information and assistance concerning potential funding and in making submissions when:

- many ICCs appear to be unaware of PBCs;
 - in a number of cases, ICCs lack understanding of the native title context; and
 - the quality of services provided by ICCs is highly variable and dependent upon the capacity of regionally based staff and their understandings and knowledge of local situations.
- It is unclear as to whether ICCs can assist in identifying and co-ordinating State and Territory based Indigenous programs.
 - There is a need for co-ordination of Commonwealth, State and Territory involvement with PBCs and discussions between the States and Territories and the Commonwealth regarding their respective responsibilities for PBCs. PBCs also need to meet with relevant State and Territory authorities to identify State and Territory potential funding sources, information about which is also contained in the PBC toolkit.
 - Where PBCs are referred to other services, there may be a need for monitoring and follow up to assess whether they are receiving the support they need.

2.6 Direct Funding

The language in which 'direct funding' is couched in the guidelines is negative and makes an assumption that there are no functioning PBCs. A more positive emphasis might be put on PBCs who have the capacity to carry out their functions without NTRB assistance.

2.7 Training and governance

There are a number of issues in the assumption in the guidelines that ORAC can provide governance training including:

- ORAC does not have the capacity to provide training to its existing 2500 corporations and undertakes a very limited number of training sessions per year.
- ORAC does not provide assistance for PBC members for travel and accommodation in attending training workshops.
- A customised PBC training workshop is needed.
- ORAC does not provide train the trainer courses which are essential if training is to be rolled out to reach all PBCs.
- Introductory governance training is also required for PBCs prior to determination apart from the Certificate training on offer.

A wide range of other capacity building and training needs remain unaccounted for including:

- Report writing for grants acquittals, tenders and contracts

- Submission writing
- Information technology
- Skills and training audit in partnerships with TAFE
- Interpreting services
- Tax, financial accountability, accounting, understanding financial statements
- Understanding and using government processes
- Cultural and natural heritage – management, rangers, preservation
- Developing cultural protocols and cultural awareness programs
- Health and wellbeing
- On country teaching, visits, language
- How to do cross cultural training
- Librarian skills – technical, archival
- Non-accredited on the job training
- Community development skills
- Understanding legislation – NTA, land rights
- Policy reading and writing
- Organisational communication
- Research and project management
- Management skills

2.8 Third Party funding

A number of issues arise in the expectation that third parties should fund agreement-making processes. In such circumstances, the ability of PBCs to reach free, prior and informed consent is compromised and there is a clear potential for conflict of interest. Such agreement-making processes are easily perceived as lacking in integrity, and can mean that other parties involved in negotiations may not see the negotiations as independent.

Engaging externally with other parties, especially in the process of negotiating memorandums of understanding and ILUAs, can often be a daunting task for PBCs that have limited experience and expertise. Processes of engagement are often initiated by proponents rather than the PBCs themselves.

3 Suggestions from the PBC national meeting

Participants at the PBC national meeting asked Governments to:

- be responsive to the needs of PBCs rather than dictating what they should and should not do

- view PBCs more broadly (as they are viewed by their communities) as vehicles to achieve a number of social outcomes
- engage with PBCs more directly through consultation and see PBCs are valid stakeholders in the community
- be more open and direct about what the government's goals and objectives are in relation to PBCs. (The rationale underlying the current changes needs to be clearly articulated especially since it has been decided that NTRBs will no longer exist once claims are finalised.)
- be transparent about the resources and funding that it is and is not willing to provide
- create a pool of funding specifically for PBCs
- provide adequate resources to fund capacity and governance for PBC staff and members
- ensure that any measures introduced will respect the sovereignty and independence of PBCs
- visit PBCs on the ground
- support PBC state based meetings followed by annual national meetings to measure changes
- recognise that PBCs are a 'creature of Commonwealth law and that... Governments should be responsible for obligations they place on PBCs and for example, fund them for their native title activities required under the legislation. (For example they are expected to negotiate agreements with large mining companies without adequate support such as access to a range of expertise to capitalise on the economic opportunities available to them.
- recognise that PBCs are determined to become effective functioning bodies but that they are disadvantaged at the outset through limited funding and assistance to achieve this.
- address the fact that PBCs will exist in perpetuity and will require a secure resource base through their land holdings, rather than trading off their land.
- give PBCs tax concessions for land rates for their land; and
- appropriately value compensation.

4. Centralised support required for PBCs

There is a need for systematised support for PBCs beyond what is envisaged in the guidelines including:

- dedicated NTRB and NTSP positions funding to service PBCs in their day-to-day operations and to facilitate a transparent and accountable process whereby PBCs might access funding;
- dedicated PBC support within FACSIA and ORAC which does not diminish funding of NTRBs and NTSPs to provide accessible, cost effective and culturally appropriate assistance to PBCs:

- to progress specialised capacity building and provide expert advice;
- enable the pooling of resources and promote opportunities for communication and networking;
- provide submission writing assistance;
- inform other Government bodies about PBC needs;
- collect information on the role, functions and structures of PBCs as templates for use when designing corporate structures;
- generate tools and resources for cross cultural communication especially in terms of the implications of various models for the design of PBCs;
- collate information on the funding and resources that are currently available to PBCs from both government and non-public sources;
- facilitate opportunities for information sharing between PBCs;
- map the relationship between PBCs and existing corporations and agreements;
- carry out a skills assessment and identify existing expertise;
- develop partnerships with other government agencies such as the NNTT and ORAC in areas such as managing a corporation, how to apply for appropriate funding, developing templates etc;
- create resources for the CATSI transition;
- source more funding and support for NTRBs in its new proposed role;
- develop registers of qualified legal, economic, business, financial and other experts that are accessible to PBCs;
- identify funding programs and grants as they arise and advise PBCs (and all corporations for that matter) re funding opportunities and relevant contacts within Government Departments;
- network PBCs through a PBC email network or through the web;
- co-ordinate information flow and resources; and
- gather PBC data and develop PBC profiles.