



AIATSIS

AUSTRALIAN INSTITUTE OF ABORIGINAL
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December 2016

Assistant Secretary, Land Branch
Department of the Prime Minister and Cabinet
PO Box 6500
Canberra ACT 2600

BY EMAIL ONLY: nativetitle@pmc.gov.au

Dear Assistant Secretary,

AIATSIS Submission – Prescribed Body Corporate (PBC) Support Strategy

The Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) recommends that the Commonwealth recognise the changing roles of Native Title Representative Bodies and Service Providers (NTRB/SP) and the infrastructure and support they provide to the PBC sector while offering flexible policies and processes that allow for PBC autonomy and local decision-making.

Our contribution is informed by: our legislative function to advise the Government on the situation and status of Aboriginal and Torres Strait Islander cultures and heritage; the PBC support strategy – consultation paper provided by the Department of Prime Minister and Cabinet (PM&C) and our expertise in engaging with PBC research and policy over the past ten years.

AIATSIS and PM&C recently co-hosted a NTRB/SP Policy and Research Forum in Canberra at which NTRB/SP CEOs and senior staff engaged directly with Government in response to the consultation paper. The outcomes of this forum also inform this submission.

Yours sincerely,

Dr Lisa Strelein
Executive Director – Research





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AIATSIS Submission to the Department of Prime Minister and Cabinet on PBC support and funding.

AIATSIS' Expertise and Context

AIATSIS welcomes the opportunity to contribute to policy on PBC support and funding. For over 20 years the AIATSIS Native Title Research Unit (NTRU) has been funded to provide research and information resources to support the native title sector. Our research activities are determined by consultation with a wide range of stakeholders across the native title sector including government, non-government, industry and Indigenous organisations and communities. Consultation occurs through a wide range of participatory forums at local, regional and national scales including the annual National Native Title Conference. Our research has built a substantial knowledge base that guides policy and decision making and contributes to a better understanding of the challenges facing native title holder communities. Research that assists native title communities to hold, manage and enjoy the potential benefits of their rights and interests in traditional lands and waters is a high priority.

AIATSIS has developed significant expertise in the development, application and reform of native title law and policy and this submission will draw on this broad evidence base.



AIATSIS' response to consultation paper

Our submission addresses the four main points identified in the Terms of Reference (TOR):

1. *Better engagement between PBCs and governments*
2. *More effective, transparent and coordinated funding for PBCs*
3. *Additional support for PBCs (other than providing direct funding)*
4. *Options for legislative and institutional role reform to support an effective and accountable native title system*

The submission is structured as responses to the questions posed in the Consultation Paper.

As an overarching response, AIATSIS promotes the recognition of diversity in the PBC sector and recommends flexibility in the system that supports and regulates the PBC sector.

AIATSIS' view is that 'supporting the increasingly diverse roles and functions of native title holders and those of their representative organisations will require increased flexibility in the current system regulating [native title organisations]' (AIATSIS, 2013: 2). AIATSIS's research with PBCs has previously mapped significant points of diversity amongst PBCs, in terms of the:

- nature and extent of the group's native title rights;
- size, age profile and location of residence of the native title group;
- level and type of future act activity in their determination area;
- existence of future act or other native title agreements that deliver significant financial benefits to the group;
- group's relationship with their local NTRB/SP;
- age and corporate history of the RNTBC;
- corporation's administrative capacity and access to infrastructure (such as staff and office space);
- skills and knowledge of its directors;
- organisation's corporate structures and the interaction between them;
- geographic location of the group's determination and its proximity to economic centres;
- nature of the political relationship between the native title group and their respective state or territory government;
- political cohesiveness of the native title group;
- existence of Indigenous Land Use Agreements; and
- specific social and cultural aspirations of the native title group (AIATSIS, 2013: 27).

More recently AIATSIS (Burbidge & Pearson, Forthcoming 2017) has analysed comparative, publicly available financial data of PBCs from 2010-11 and 2014-15. AIATSIS found that there was substantial diversity in the economic growth of PBCs and the geographical distribution of PBC size, income, equity and activities.

This diversity in aspirations, capabilities, assets and income will remain a feature of the sector for many decades and should be recognised and embraced in all policy design and funding and engagement models.

1. Better engagement

The Government proposes continuing to use Native Title Representative Bodies and Native Title Service Providers (NTRB/SPs) to approach and provide support for PBCs as well as working directly with PBCs on a regional basis when that is the PBC preference (Consultation Paper, Oct 2016: 2).

Question 1. What is the best way for the Commonwealth to engage with PBCs, now and into the future?

Successive Closing the Gap reports and Overcoming Disadvantage Reports, among others, have highlighted the need for governments to improve their engagement processes. This requirement corresponds with the principle of self-determination, which promotes the need for policies and approaches that empower people to shape their lives and their communities according to their aspirations. A principled approach that links engagement with 'involvement' is central to the COAG National Indigenous Reform Agreement and has been reinforced by Prime Minister Malcolm Turnbull in his 2016 Closing the Gap speech:

I can't stress enough how important it is to allow decisions to be made closer to the people and the communities which those policies impact. *(Turnbull 2016)*

Engagement by governments occur across a spectrum, from informing large sectors of the public about existing programs and policies, through to processes for co-design of local program delivery. However, governments currently spend far too much of their time in the 'informing and consulting' end of the spectrum and not enough in the 'collaborate and empower' end.

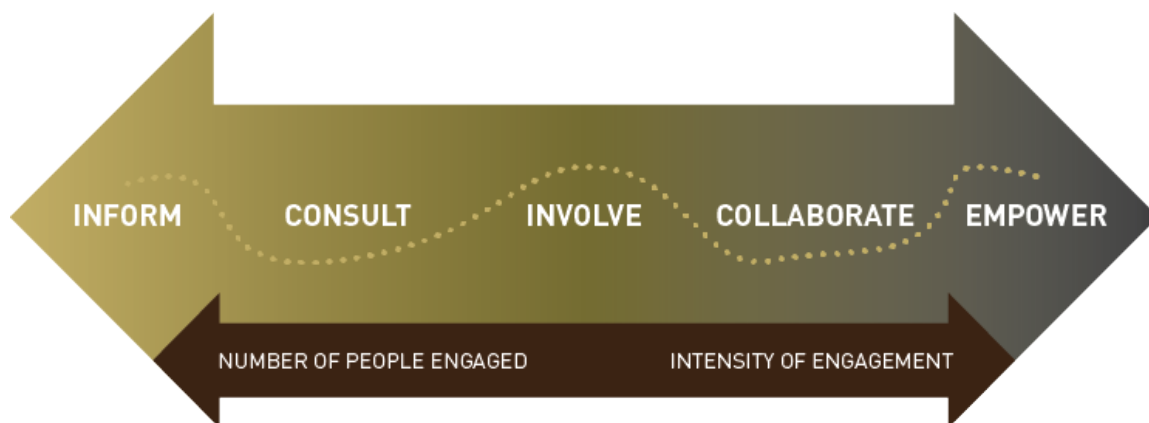


Image: © AIATSIS 2016. Core Cultural Learning: Aboriginal and Torres Strait Islander Australia: foundation course for Commonwealth employees, Module 8 Engaging with Aboriginal and Torres Strait Islander Communities.

AIATSIS has engaged with PBCs over the last ten years through regional and national fora (as well as research projects) to elicit aspirations, challenges and achievements and to develop an understanding of this important sector as it emerged. Throughout these fora, PBCs have expressed a strong desire to have their voice heard and perspectives sought in national debate, policy and program design in relation to native title and other matters that impact Indigenous peoples as peoples, but particularly where matters concern their role as PBCs.

With very limited independent wealth across the vast majority of the sector any national coordination or body has not eventuated. For most PBCs, their primary advocacy has been through their NTRB/SP. As NTRB/SPs are increasingly undertaking roles in relation to post

determination matters and PBC support, NTRB/SPs remain a critical conduit for government engagement with PBCs.

The recent announcement that the National Native Title Council (NNTC) will expand its membership to include PBCs represents a significant new opportunity for the Government to engage with PBCs through this network and for PBC perspectives to be more visible in the national native title policy environment.

The regional meetings held by AIATSIS from 2009-12 were highly successful model for engagement. PBCs have expressed their strong support to have regional meetings to engage with stakeholders on issues directly relevant to their region. A number of NTRB/SPs currently coordinate meetings of PBCs within their regions on a regular basis. Some regional PBC networks also exist (for example, the Victorian federation of traditional owners and the Gur a Baradharaw Kod in the Torres Strait) and meet regularly. The existing calendar of meetings provides a significant but underutilised opportunity for governments to engage with PBCs directly.

However, such regional meetings are costly and, given the direct benefit to government engagement strategies, governments may be able to assist in supporting these fora financially.

National Indigenous policy workshops, committees and reviews or inquiries should seek to include PBC representation and perspectives.

In addition, where appropriate, existing networks (such as, AIATSIS PBC networks and information products) should remain a key part of a coordinated engagement strategy. These networks can assist in identifying key contacts, and facilitate the flow of information in the PBC sector. Regionally, most NTRB/SPs have newsletters or other communication products that are not well utilised by government.

Finally, engagement strategies should respect and empower the PBCs' autonomy in decision making and foster their authority and independence in managing traditional lands and waters (D Smyth, R Kennett et al. 2014, P McGrath, C Stacey & L Wiseman 2013: 29). There is a need for both Commonwealth and State governments to engage with native title holders and their representative organisations in processes of genuine partnership that respond to the priorities and outcomes desired by local or regional groups. The South Australian regional authority policy is a strong commitment in this regard. There are far too many determinations of native title and, consequently, PBCs that have not benefited from settlements that establish long term sustainable resourcing of agreed priorities.

This kind of intensive engagement and partnership is challenging for governments, even more so in intercultural contexts. It requires building the skills and capabilities of Commonwealth staff and in particular improving knowledge and understanding across government of the importance of native title and the legal recognition that it provides. However, the opportunities for innovative and beneficial outcomes for Indigenous peoples, economically, socially and culturally, are evident.

2. More effective, transparent, coordinated funding

Question 2. Is current PBC funding reaching those PBCs that need support to maximise available opportunities for economic development and partnerships, within the context of the aspirations of the native title holder group? How can more PBCs take advantage of the existing funding opportunities?

For the past ten years, AIATSIS has worked with PBCs to identify the aspirations commonly held by PBCs and the broader native title holder community. Native title holders hold a wide range of aspirations for their PBCs; being able to effectively care for country, culture and people and having the ability to implement economic and commercial business development (AIATSIS, July 2013: 8; P McGrath, C Stacey & L Wiseman 2013: 29 and AIATSIS, November 2014: 2). There is currently an inordinate gap between supply and demand in relation to PBC aspirations and funding. In the large majority of cases the expectations of PBC members about what it means to enjoy and manage native title rights and interests are much wider than what governments may understand the legal obligations of a PBC to be. Unfortunately, this gap is exacerbated as, in the majority of cases, the expectations on a PBC far exceed the capacity of a PBC to deliver against those expectations.

Few PBCs have the resources to undertake the wide range of activities that their members' desire – most of the income and assets in the sector are held by relatively small number of PBCs. A recent comparison of publicly available financial data from PBC General Reports to the Office of the Registrar of Indigenous Corporations (ORIC) found that while some PBCs are growing financially many smaller PBCs are not. For example, by the 2014-15 financial year there were 155 PBCs around Australia. According to the ORIC classification of corporation size by large, medium and small there were 4% large, 23% medium and 73% small PBCs. Additionally, 52% of PBCs earned no income at all and another 22% earned \$100,000 or less. PBC assets follow a similar pattern: 57% of the 155 PBCs had no assets and another 28% had assets worth \$100,000 or less (Burbidge & Pearson, Forthcoming 2017: 39-47). These figures show that at least 70% of PBCs in Australia are small with very little income or assets, if any, and would benefit from Government funding.

For most PBCs the lack of access to sufficient funding has been identified as a significant barrier to success (AIATSIS 2014, p. 2). Even though there is funding available under the Indigenous Advancement Strategy (IAS), few PBCs were able to access this. Our research and communication with PBCs indicates a number of reasons for poor uptake in funding opportunities including:

- Some PBCs were unaware of the funding options available to them, particularly that the IAS funding has a designated area for PBC funding and believed they would be competing with the broader pool of IAS applicants, which PBCs view as being unfavourable to them.
- Lack of PBC capacity - many PBCs do not have staff, for example by 2014-15 financial year only 24% of PBCs had one or more staff members, meaning that most PBCs rely on support staff where possible or volunteer labour (Burbidge & Pearson, Forthcoming 2017: 46).
- Lack of assistance available – many PBCs were unable to gain assistance, including from PM&C, in understanding the application process and completing applications and lacked the internal capacity to make applications.

- Inability to access to information on funding – Even with targeted circulation of information such as through AIATSIS networks, because of high staff turnover in unpaid positions many PBCs do not receive material as they do not have functional or updated contact details.

In order to improve the accessibility of the PBC targeted Government funding AIATSIS has the following recommendations:

- Simplify the application process with Government assistance available for low-capacity PBCs
- Provide grant writing and related training for PBCs
- Use social media and other platforms to more widely promote and clearly communicate the training opportunities available for PBCs
- Provide dedicated help line services
- Build regional capacity of PM&C to provide advice and assistance at local and regional scales
- Support and use established Indigenous communication networks including AIATSIS to assist in advising people about government funding programs

Question 3: What are your views on the proposed changes to funding arrangements?

The Government proposes the following changes:

Basic Support Funding

PBCs or their authorised parties can apply directly for funding. A new application process will need to be introduced.

Remove the current \$50,000 nominal cap if activity justifies expenditure

The Minister for Indigenous Affairs would make funding decisions as part of an annual PBC support funding application round (Attachment A, Oct 2016: 7).

Over the past ten years PBCs have repeatedly expressed a desire for financial autonomy. In 2007, a core PBC aspiration was autonomy and independence through economic development (for example, creating an effective capital base for on-country housing). Ten years later, at the 2016 National PBC Meeting, funding and access to resources was still the most prominent topic of discussion. PBCs who used the Basic Support Funding expressed a range of concerns about the program:

- Those PBCs who do not work with the NTRB in their region would like to be able to access basic support funding independently from the NTRB.
- PBCs asked for more flexible conditions on how the money could be spent, for example, on capacity building, development, and post-determination litigation, in addition to PBC operations.
- Some PBCs were concerned that \$50,000 is not enough to cover operational costs.

AIATSIS recommends that Basic Support Funding should be available to PBCs that elect to apply directly where the PBC has capacity to administer funds. This may be desirable for PBCs, where the PBCs operate independently of NTRBs or seek to engage the services of the NTRB on a fee for service basis.

AIATSIS also acknowledges that the best planning for setting up an operational and sustainable PBC happens with the native title claim group, prior to the registration of the PBC. The establishment of a fully functioning PBC is time-consuming and costly: reportedly up to \$500,000 in some regions. Without proper governance structures and processes set up in the early stages of the PBC's development, the likelihood of internal disputes and major corporation problems increases (See Morley 2015, Hunt & Smith 2006, Australian Indigenous Governance Institute 2016). AIATSIS recommends that increased PBC specific funding be available for NTRBs to invest in PBC governance, structure, organisation and capacity building pre- as well as post-determination.

Removing the nominal \$50k cap may allow the funding amount to better match individual PBC need. Setting up and operating a PBC is expensive. Our research with a PBC in Victoria estimated that everyday operational costs (office, car leasing, one staff member) were minimum \$150,000 per annum, providing the PBC was still receiving administrative, book keeping and legal support as well as financial support for meetings from the NTRB. Some NTRBs estimate the costs to be higher and the planning time to be at least two years. For example, Goldfields Land and Sea Council estimates it costs \$500 000 to establish an operational PBC in their area.

However, there are currently 160 PBCs and this number is growing substantially each year (AIATSIS, December 2016: 42). The decision to increase funds to individual PBCs may disadvantage others who then miss out entirely. The disadvantaged would likely include those with lesser capacity for planning and development (including grant/application writing). Transparency in prioritisation/selection guidelines will need to be developed in consultation with native title sector stakeholders and communicated clearly to all potential applicants. Overall, it appears inevitable that a substantially larger pool of funds is required to cater for the increase in the number of PBCs.

The decision regarding the transfer of decision-making responsibility to Ministerial level for Basic Support Funding will need to consider the impact on already stretched sector of longer wait times and potentially a less transparent process.

Question 4. How do PBCs want to get information about funding related changes in the future?

Our response to question 1 is also relevant here.

The Commonwealth Government has access to a range of existing networks and tools (including NNTC, NTRB networks and AIATSIS) to disseminate news about changes to PBC funding. Social media is also a key information exchange medium in Indigenous Australia, as is local radio and Indigenous newspapers and other media. These mediums can be used by Government to increase awareness and knowledge of funding opportunities. Importantly, this communication should encourage and support two-way communication so PBCs directly address questions to Government and seek clarification on process, principles and decisions.

A well informed and accessible regional Government presence would assist in improved knowledge brokering and engagement. Regional staff should receive native title education and training, including local cultural learning, to ensure advice is accurate and targeted to the sector and to the particular needs of the groups in their region. This will increase the opportunities for and value of face to face information exchange.

Question 5. What are the current support services available to PBCs? How can this be better coordinated?

AIATSIS has contributed to a recent audit of PBC support services conducted by the PBC Support Forum initiated by the National Native Title Tribunal (NNTT). This is likely to be the most complete and recent list of support services available. Feedback from some NTRBs indicate they were not aware of all the opportunities identified in this audit suggesting that there is scope for improvement in communication within the sector. However, by far the greatest investment in PBC support services are delivered by the NTR/NTSP sector. The recent NTRB policy and research forum hosted by AIATSIS and PM&C highlighted current practice and innovation in NTRB/SP PBC support. AIATSIS has undertaken to develop this material further for publication and awareness-raising.

A key advance in providing support services to PBCs has been the development of a range of regional service delivery models by NTRB/SPs as well as PBCs themselves. The regionalisation of service provision to PBCs is advantageous for many reasons: economies of scale, flexibility of local models, cost efficiency, and regional political representation and commercialisation. Many NTRBs/SPs have begun providing PBCs with services under funding agreements directly with PBCs, setting up subsidiary companies for service provision or recommending qualified consultants who understand the native title context to provide those services.

Regional NTRB/SP services currently provided to PBCs are within the areas of:

- Administration and operations
- Human resources and labour hire
- Finances and book keeping
- Meetings
- Media and communications
- Policy and procedures
- Compliance
- Governance and conflict management
- Legal advice and future acts
- Research
- Mapping and Geographic Information Systems (GIS)
- Strategic planning
- Capacity building through project work, training and community/cultural development.

The range of funding and resources available for NTRBs/NTSPs to conduct PBC support is diverse, ranging from almost no capacity due to limited funding and a high level of claims work to more capacity from regional service models. A better understanding of the range of these regional delivery models, their critical success factors and applicability across the sector, is urgently needed and subject of preliminary research by AIATSIS.

It is evident that any assumption that NTRBs will have a limited ongoing role in PBC support is unfounded (L Strelein, T Tran et al. 2013: 6). NTRBs continue to play a critical role in the supporting PBCs and growing the sector - and assisting native title holders to enjoy the benefits of their hard won native title. The nature of the PBC-NTRB relationship will change as NTRBs take responsive service provision roles unique to the needs of their clients and their

regions. Increasingly, where desired by native title holders, PBCs will assume greater roles in local decision making and representation.

The regionalisation of Aboriginal and Torres Strait Islander political representation within the native title sector could potentially increase the voice of PBCs to participate in regional and national decision making and assist government engagement with PBCs. Government structure and services could align with regionalisation while providing a more coordinated approach by,

Employ[ing] dedicated staff members who understand RNTBC structures and needs. This approach could be mirrored in state and territory government, and the teams could work in whole-of-government coordinated approaches. They could simplify and facilitate access to existing government programs for RNTBCs, identify news funding programs and grants for RNTBCs as they arise, connect RNTBCs with contacts within other government departments, and develop policies and programs directed to the needs of RNTBCs.' (Bauman, Strelein & Weir 2013: 20)

For a more coordinated response, there needs to be national understanding including research, resourcing and funding available for the regionalisation of PBC services, including the various support models utilised by NTRB/SPs and PBCs working together in a range of ways that suit local needs.

Government and other native title organisations will need to work closely together to ensure that work and resources are not being unnecessarily reproduced and that models of successful service provision and support are being shared nationally.

3. Other support

According to the consultation report, the Government is open to providing other support services to PBCs and suggest:

- Sector-facilitated training and networking
- Promoting information about successful and diverse use of Indigenous land
- Facilitating engagement between PBCs and the private sector (Consultation paper, Oct 2016, 4).

Question 6. Are PBCs interested in participating in these kinds of projects?

Sector-facilitated training and networking

The recent audit of PBC support services conducted by the PBC Support Forum indicated a number of significant gaps within the training and support on offer for the PBC sector. For example, in order to hold an AGM, a PBC will require administrative support to prepare and distribute notices to members; financial expertise to prepare reports; governance and leadership skills to guide discussion and decision making; facilitation skills to help resolve disputes; legal expertise to discuss any future act negotiations, and geospatial skills in order to prepare or commission maps . Without appropriate training opportunities it is difficult for PBC directors to gain capacity in sector specific skills.

While there are some training opportunities through some NTRB/SPs, not all NTRB/SPs have the resources to conduct training on skills required by PBCs in their regions.

PBCs and/or PBC support officers have expressed interest to AIATSIS in receiving training in the following areas:

- Financial management and book keeping
- Grant and funding applications
- Strategic and land use planning
- Governance
- Conflict management
- Commerce, such as small business management
- Law
- Community development

Training will need to match priorities identified in consultation with PBCs, NTRB/SPs and other relevant organisations.

Government regulated private sector partnerships

Government could provide assistance to and regulation of engagement of PBCs with the private sector, as this has been a successful partnership in economic development for some PBCs, for example, Antakirinja Matu-Yankunyjtjara gaining contract with Stony Creek ventures or the Victorian Federation of Traditional Owner Corporations with Barpa. This could include:

1. Producing guidelines for the private sector engaging with PBCs. This could help encourage partnerships between the private sector and PBCs while regulating the sector.
2. Providing information and training to PBCs about how to effectively engage with the private sector e.g. how to develop and maintain partnerships, how to choose an investor etc. This would help PBCs develop the 'know-how' of how to succeed in this area.
3. Sharing information and stories about successful collaborations between PBCs and the private sector. This could help promote partnerships with PBCs to the private sector and give PBCs ideas, inspiration and practical information about what they could do with the private sector.
4. Hands on and practical training about collaborations between PBCs and the private sector.

Establishment funding

In this section the Government questions whether there is an interest for a model similar to the Indigenous Protected Areas programme or the 'establishment funding' in the Deloitte Review.

Question 7. Is there interest in funding for this purpose? How can it be prioritised?

AIATSIS agrees with the Deloitte recommendation that establishment funding is vital in the establishment of operational and sustainable PBCs and research shows that early and long-term strategic planning for PBCs has vast economic, community and cultural benefits for the corporation and native title holder group.

Establishment funding needs to be available to NTRB/SPs who are working directly with claim groups to design and set up PBCs with strategic plans, long lasting governance structures and to address conflict management prior to the setting up of the PBCs.

Establishment funding also needs to be flexible and available for the duration of the time it takes PBCs to prepare proper governance structures and processes, and undertake strategic planning; recognising that this time frame could vary significantly between individual claim groups. For some claim groups, for example in South Australia or Victoria, much of this planning might be undertaken prior to the settlement of the claim to ensure the needs of setting up a viable PBC are built into the settlement package. For other PBCs, in regions of Western Australia for example, aspects of PBC establishment, such as long term planning, may still be happening 24 months after the PBC has been registered.

The application process for establishment funding needs to account for regional flexibility impacted on by the claims process, be clear and not time-consuming, and available to both NTRB/SPs and PBCs directly, but noting that the expertise in setting up sustainable PBCs generally lies with the NTRB/SP in the beginning.

Minor legislative and institutional role reform

Question 8. What would a system of low cost and final dispute resolution between members of the native title group and PBC lead to earlier consideration and potentially resolution of disputes?

The role of PBCs in managing disputes and conflict over membership of the native title holding group or corporation, decisions of the PBC, distribution of resources or compensation/impacts of future acts is vastly under-recognised and under resourced. Many of these decisions are decisions of the group in the application or interpretation of traditional laws and customs and are not to be interfered with by non-Indigenous courts. Some however may result in legal proceedings under corporations law or trust law. It is imperative that we understand and support the role of PBCs in managing disputes and facilitating sustainable decisions.

We note that a truly 'final' resolution of a dispute is often unrealistic and unnecessary in order to facilitate a course of action that can be agreed by all parties to a dispute. Indeed, final resolution of a dispute is generally the province of the legal system. We therefore focus our comments on dispute management. AIATSIS recommends that resources be invested in dispute management within native title groups, via the NTRB/SP where appropriate or an external body, such as the NNTT, or experts in dispute management and decision making processes. Ideally work would occur prior to setting up the PBC but many existing PBCs require access to support services, tools and training.

By investing early with the claim group in negotiating decision making and dispute resolution processes, the forthcoming PBC will have established processes in place before incorporation and before any dispute arises.

The post-determination issues concerning membership faced by the PBC could be reduced by ensuring culturally appropriate membership rules and decision making processes have already been agreed and implemented prior to a determination, that the evidentiary basis for the determination is clearly understood and the PBC has access to the research undertaken for the claim.

Question 9. How could the accountability of PBCs to native title holding groups for compliance with PBC regulations be improved?

The legal relationship between the PBC and the common law native title holding group is not yet well understood. In particular there is some confusion about how the rules normally associated with corporations and their primary accountability to their members are modified by the legal requirements of holding or managing native title.

The likely legal doctrines that would apply in relation to decisions of the PBC and in particular the management of rights and interests and any funds received as a consequence of the exercise of rights and interests or from acts affecting native title are predictable. The fiduciary relationships or constructive trusts that emerge in such circumstances have a strong legal history. However, these responsibilities and legal doctrines are not yet familiar in the native title context. It would be advisable to amend the PBC regulations or the NTA to clarify the fiduciary relationship rather than rely on the development of legal precedent through costly and painful litigation.

There is also a need for information, tools and training for PBC directors about these legal responsibilities and how to effectively exercise them, to identify risks and understand the legal implications of their decisions.

Better advice and technical capability among staff of the Office of the Registrar of Indigenous Corporations (ORIC) could also improve the consistency of information provided to PBCs and ensure alignment with native title law regarding the fiduciary responsibilities of PBCs to the common law native title holders. ORIC training for PBC Boards must be native title specific to account for the important differences in corporate and legal accountabilities.

Question 10. Should the PBC regulations that relate to transparency and accountability to native title holders about the use of native title monies also apply to native title monies held outside of the group?

As noted above, there is a need for clearer statements of the legal obligations of any person who receives a benefit from the exercise or impairment of native title (whether pre or post determination) to act in the best interests of and hold or use such funds for the benefit of the common law native title holders. The extent to which these obligations can be included in regulations to introduce clarity on these matters and provide an educative function would be beneficial, instead of relying on future litigation.

This clarity is particularly important where native title groups rely on legal and financial advice from non-native title experts. While NTRB/SPs have statutory functions that require them to have regard to all who may hold native title, other advisers are not subject to the same statutory obligations. This lack of accountability and expertise places PBCs and native title applicants at considerable risk.

However, PBCs should not be fettered in how they decide to use and manage funds in consultation with the common law native title holders. It is inevitable that PBCs will make mistakes in terms of investments and use of funds and must have the freedom to do so. The Commonwealth should not impose oversight or accountability mechanisms that impede the right of Indigenous peoples to determine their own development and make their own decisions. In particular, the Commonwealth should avoid actual or perceived discrimination in any transparency and accountability measures.

Question 11. Are current mechanism for streamlined decision-making processes, such as standing authorisations and alternative decision-making processes, being used by PBCs? How can information about these mechanisms and their usefulness be improved?

AIATSIS is conducting research on PBC governance and decision-making structures using PBC rulebooks/constitutions. In particular, AIATSIS will examine how many PBCs are using a default model or their own agreed decision-making process, any correlations between size and decision-making, how many rules books include alternative native title consultation processes and what conclusions can be drawn about this. The findings of this research are likely to contribute to greater understanding of the issues encompassed by this question.

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