



Appendix 2

Recommendations in the PBC Report resulting in changes to PBC-related legislation

Recommendation	Implementation	Implications
<p>1. Advise all stakeholders the extent to which NTRBs may assist PBCs following their establishment and incorporation.</p>	<p>Policy development Department of Families, Community Services and Indigenous Affairs, Native Title Program – Guidelines for Support of Prescribed Bodies Corporate (PBCs)¹</p>	<ul style="list-style-type: none"> ▪ NTRBs will be allowed to use their native title program funding to assist PBCs with their day to day operations in specific circumstances. ▪ NTRBs will be required to report on the nature and level of support they expect to provide to PBCs, and on the implementation of such measures.
<p>2. Prepare and maintain information packages for PBCs outlining:</p> <ul style="list-style-type: none"> ▪ relevant State and Territory legislation ▪ potential sources of assistance through government grants and programs ▪ potential support from the private sector. 	<p>Policy development</p> <ul style="list-style-type: none"> ▪ AIATSIS NTRU, Native Title Resource Guide² ▪ National Native Title Tribunal, Guide to Sources of Assistance and Funding for Prescribed Bodies Corporate³ 	<ul style="list-style-type: none"> ▪ Provides information to PBCs and other stakeholders about State/Territory legislation, native title policies and procedures and native title more broadly. ▪ Provides a compilation of the support available for PBCs including direct assistance, application-based and funding program assistance, and private sector assistance. ▪ Improves the ability for PBCs to access and utilise existing sources of assistance. ▪ Improves access to information affecting PBCs and native title holders.



Recommendation	Implementation	Implications
<p>3. The Attorney General should press State and Territory Governments to agree to:</p> <ul style="list-style-type: none"> ▪ ensure PBC establishment needs and other requirements are considered by all parties as a matter of practice when negotiating consent determinations or future act agreements. ▪ actively promote a better understanding of the functions, needs and responsibilities of PBCs among other stakeholders in the native title system. 	<p>Process development</p> <ul style="list-style-type: none"> ▪ Facilitation through multilateral forums, such as the Native Title Ministers' Meeting, Native Title Consultative Forum ▪ Facilitation through bilateral meetings and consultations at ministerial officer level <p>Policy development</p> <p>Guidelines for the behaviour of parties and their representatives in mediation in the National Native Title Tribunal</p>	<ul style="list-style-type: none"> ▪ Provides an avenue for the consideration of PBC needs to become an established part of the process, both in negotiating determinations of native title, but also native title agreements. ▪ Provides all native title parties with an understanding of the functions, needs and responsibilities of PBCs and native title holders. ▪ Potential for further assistance from third party proponents to assist with achieving aspirations and outcomes.
<p>4. Coordinate the provision of relevant information for PBCs in the lead-up to a determination of native title. This should include:</p> <ul style="list-style-type: none"> ▪ information and training on roles and responsibilities ▪ related governance issues ▪ sound decision-making processes ▪ record keeping. 	<p>Policy and process development</p> <ul style="list-style-type: none"> ▪ Information to be provided by ORAC, the National Native Title Tribunal and the relevant native title representative body ▪ ORAC have produced a detailed information package addressing issues specific to native title and RNTBCs, in the CATSI Act – commencing 1 July 2007, and provide assistance and training with establishment and incorporation. 	<ul style="list-style-type: none"> ▪ Increase PBC and native title holders understanding of roles and responsibilities and statutory obligations. ▪ Improve the capacity for native title holders and PBCs to make informed decisions about appropriate governance structures. ▪ Assist with the identification of and addressing training needs to ensure sound governance. ▪ Improves the overall structure and governance of the PBC to allow for increased concentration on protecting the native title rights and interests.



Recommendation	Implementation	Implications
<p>5. Amend the PBC regime to provide that the statutory requirements for PBCs to consult with and obtain the consent of native title holder on 'native title decisions'⁴ are limited to decisions to surrender native title rights and interests in relation to land and waters.</p>	<p>Legislative development The Native Title Act⁵ has been amended to allow the PBC Regulations to make provision to this effect.</p>	<ul style="list-style-type: none"> ▪ The removal of the statutory requirement contained in Section 58 of the Native Title Act, for PBCs to consult with the common law holders on all agreements and decisions that affect native title. ▪ Compulsory consultation is now only applied to decisions to surrender native title rights and interests in land or waters.⁶ ▪ Amends regulations to provide for agent-PBCs to enter native title agreements on behalf of common law holders that are legally binding.
<p>6. Amend PBC regulations to:</p> <ul style="list-style-type: none"> ▪ clarify the circumstances in which 'standing authorisations' may be issued to a PBC, and ▪ to provide that only one certificate needs to be issued with each authorisation. 	<p>Legislative development The Native Title (PBC) Regulations 1999⁷ will make provision to this effect.</p>	<ul style="list-style-type: none"> ▪ Allows PBCs to certify their compliance with the consultation and consent requirements pursuant to a written certificate of authority. ▪ Provides that if the proposed decision is of a kind about which the common law holders have been consulted; and that the common law holders have decided that decisions of that kind can be made by the PBC, only one authorisation is required. ▪ Not all members of the native title holders identified in a native title determination must become members of the PBC – does not protect members who are not members of the PBC. ▪ May amount to non-compliance with authorised procedures to be enforceable as part of the statutory scheme and may affect the validity of agreements not complying with them.⁸



Recommendation	Implementation	Implications
<p>7. Amend the PBC regime to enable an existing PBC to be determined as a PBC for subsequent determinations of native title in circumstances where the native title holders covered by all determinations agree.</p>	<p>Legislative development</p> <ul style="list-style-type: none"> ▪ the Native Title Act⁹ has been amended to allow the PBC Regulations to make provision to this effect. ▪ the Native Title (PBC) Regulations 1999¹⁰ will make provision to this effect. 	<ul style="list-style-type: none"> ▪ Allows a prescribed body corporate to be the trustee for, or act as an agent or representative for more than one group of common law holders in relation to a native title determination, if consented to by all native title holders. ▪ Allows PBC infrastructure and resources to be used by more than one group of native title holders, encouraging economies of scale. ▪ Regulations will prescribe how consent is obtained for use of the PBC by the native title holders.
<p>8. Amend PBC regulations to remove the requirement that all members of a PBC be native title holders and associated safeguards should be included to ensure the protection of native title rights and interests.</p>	<p>Legislative development</p> <ul style="list-style-type: none"> ▪ not relevant to PBCs – NTA not amended to provide for this recommendation. ▪ the CATSI Act has been amended to include an Indigeneity requirement but also allow for non Indigenous membership. 	<p>This amendment does not apply to PBCs – NTA was not amended and while non Indigenous membership is provided for under the CATSI Act, the Native Title Regulations protect PBCs from this provision.¹¹</p>
<p>9. Develop and distribute appropriate educative material regarding obligations and requirements under the CATSI legislation to all PBCs and NTRBs. This should include:</p> <ul style="list-style-type: none"> ▪ a Guide to Good Governance specifically tailored to PBCs ▪ model rules for PBCs ▪ additional information as appropriate. 	<p>Process development</p> <ul style="list-style-type: none"> ▪ ORATSIC is currently developing a good governance tool to be delivered to the PBC sector by mid 2008. ▪ ORATSIC is also developing model rules for PBCs.¹² 	<p>The governance tool is expected to address common issues facing native title corporations registered with ORATSIC including corporate structure, trusts and compliance with both the CATSI Act and Native Title Act.</p>



Recommendation	Implementation	Implications
<p>10. Modify the process for allocating funds to NTRBs to ensure appropriate priority is given to the performance of NTRB functions associated with assistance to PBCs.</p>	<p>Policy development The Native Title Program <i>Guidelines for Support of PBCs</i> provide the policy and legislative framework and procedures for the application and allocation of funds to NTRBs to support PBCs.</p>	<ul style="list-style-type: none"> ▪ This is an application process and funding can not be guaranteed under the Native Title Program, or may not be provided to the extent sought. ▪ Funding applications can be made at any time of the year – in addition to annual program funding. ▪ The Native Title Program should not be considered a first option and applications will be assessed on the basis of alternative applications for funding from other sources. ▪ Funding will only be provided on an annual basis – no certainty for longer term projects, and no guarantee of future funding.
<p>11. Amend the NTA to:</p> <ul style="list-style-type: none"> ▪ authorise PBCs to charge a third party for costs and disbursements reasonably incurred in performing its statutory functions under the NTA or the PBC Regulations at the request of the third party ▪ provide for an appropriate authority to investigate such arrangements on request to ensure the costs were reasonably incurred. 	<p>Legislative development</p> <ul style="list-style-type: none"> ▪ The Native Title Act¹³ has been amended to allow the PBC Regulations to make provision to this effect. ▪ The inclusion of a new Division 7 – Financial matters, in the Native Title Act makes provision for this – commences on 1 July 2008. 	<ul style="list-style-type: none"> ▪ Allows for PBCs to seek reimbursement from or charge third parties for costs and disbursements expended or incurred in performing statutory functions under the NTA or PBC regulations. ▪ The Registrar of Aboriginal Corporations will be given discretionary power to give binding opinions on whether the fee is one that the RNTBC may charge. ▪ May control and constrict the capacity for PBCs to charge for their services.



Recommendation	Implementation	Implications
<p>12. Amend the General Terms and Conditions Relating to Native Title Program Funding Agreements to enable NTRBs to assist PBCs with their day to day operations in circumstances where this has been approved by OIPC.</p>	<p>Policy development Department of Families, Community Services and Indigenous Affairs, Native Title Program – Guidelines for Support of Prescribed Bodies Corporate (PBCs)¹⁴</p>	<ul style="list-style-type: none"> ■ NTRBs will be allowed to use their native title program funding to assist PBCs with their day to day operations in specific circumstances. ■ NTRBs will be required to report on the nature and level of support they expect to provide to PBCs, and on the implementation of such measures. ■ PBCs will also be able to apply for funding independent of the NTRB. ■ there will be no additional funding for PBCs this financial year.
<p>13. Actively promote measures for providing support to PBCs via Shared Responsibility Agreements (SRAs) and/or Regional Partnership Agreements (RPAs).</p>	<p>Policy development The Department of Families, Community Services and Indigenous Affairs identified the potential for PBCs to benefit from negotiating SRAs and RPAs through ICCs.¹⁵</p>	<ul style="list-style-type: none"> ■ Ministers noted the possibility of PBCs receiving assistance for broader functions via Shared Responsibility Agreements, and Regional Partnership Agreements or both.¹⁶ ■ Potential for SRAs/RPAs to promote the effective functioning of PBCs through establishment grants, infrastructure support, capacity building or funding employment for PBC staff.
<p>14. Consider possible measures to enable State and Territory land rights corporations to act as PBCs where the native title holders agree to this.</p>	<p>Process development The Australian Government will consult state and territory governments on possible measures to enable state or territory land rights corporations to act as PBCs where the native title holders agree to this.¹⁷</p>	<ul style="list-style-type: none"> ■ Ministers noted that consultation is to take place to advance this recommendation. ■ Potential to avoid the duplication and wastage of resources. ■ State and territory legislative requirements will be necessary. ■ Potential conflict of interest.



Recommendation	Implementation	Implications
<p>15. Develop a mechanism for the determination of a 'default PBC'¹⁸ in appropriate circumstances.</p>	<p>Legislative development The Native Title Act¹⁹ has been amended to allow the PBC Regulations to make provision to this effect.</p> <p>Policy development The OIPC are currently drafting legislative and regulatory amendments for the establishment of 'default' bodies corporate to perform PBC functions in circumstances where there is no functioning PBC nominated by the native title holders.</p>	<ul style="list-style-type: none"> ▪ Regulations can be used to dictate to native title holders the body that will hold their native title and/or act as their exclusive agent in relation to the protection and management of their native title. ▪ A 'transfer out' option will be provided by Regulation – common law holders will be able to transfer out of a default PBC and replace it with a new PBC.²⁰



- 1 Department of Families, Community Services and Indigenous Affairs, *Native Title Program – Guidelines for Support of Prescribed Bodies Corporate* (PBCs), Land Branch, Canberra, 2007, available online at: http://ntru.aiatsis.gov.au/major_projects/psc_rntbc.html, accessed 24 October 2007.
- 2 Australian Institute of Aboriginal and Torres Strait Islander Studies, Native Title Research Unit, *Native Title Resource Guide*, available online at <http://ntru.aiatsis.gov.au/research/resourceguide/index.html>, accessed 24 October 2007.
- 3 National Native Title Tribunal, *Guide to Sources of Assistance and Funding for Prescribed Bodies Corporate*, Research Unit, May 2007, available online at: http://www.nntt.gov.au/research/files/guide_to_sources.pdf, accessed 24 October 2007.
- 4 A 'native title decision' is currently defined in Regulation 8(1) of the PBC Regulations to mean: a decision: (i) to surrender native title rights and interests in relation to land or waters; or (ii) to do, or agree to do, any other act that would affect the native title rights or interests of the common law holders.
- 5 *Native Title Act 1993* (Cth), s58.
- 6 Native Title Amendment Bill 2006, *Explanatory Memorandum*, p73.
- 7 Native Title (Prescribed Bodies Corporate) Regulations 1999, Regulation 9(2).
- 8 Native Title (Prescribed Bodies Corporate) Regulations 1999, Regulation 8(7). Note this gives individual native title holders a cause of action against the PBC.
- 9 *Native Title Act 1993* (Cth), s59A.
- 10 Native Title (Prescribed Bodies Corporate) Regulations 1999, Regulation 5.
- 11 Native Title (Prescribed Bodies Corporate) Regulations 1999, Regulation 4(2)(a), all members of the corporation are persons who are included, or proposed to be included in the native title determination as native title holders, and Regulation (4)(2)(c) at all times after the determination is made, all members of the corporation are persons who have native title rights and interests in relation to the land or waters to which the native title determination relates.
- 12 Office of the Registrar of Aboriginal and Torres Strait Islander Corporations (ORATSIC), *Correspondence with Aboriginal and Torres Strait Islander Social Justice Commissioner – Request for Information in preparation of Native Title Report 2007*, Letter, 16 October 2007.
- 13 *Native Title Act 1993* (Cth), Part 2, Division 7, s60AB, s60AC, not yet included in the Native Title Act. As cited in Native Title (Technical Amendments) Act 2007, Schedule 3, Item 7, commences on 1 July 2008.
- 14 Department of Families, Community Services and Indigenous Affairs, *Native Title Program – Guidelines for Support of Prescribed Bodies Corporate* (PBCs), Land Branch, Canberra, 2007, available online at: http://ntru.aiatsis.gov.au/major_projects/psc_rntbc.html, accessed 24 October 2007.
- 15 Bauman, T., Tran, T., *First National Prescribed Bodies Corporate Meeting: Issues and Outcomes*, Canberra 11-13 April 2007, Australian Institute of Aboriginal and Torres Strait Islander Studies, Native Title Research Report no3/2007, p33, available online at: http://ntru.aiatsis.gov.au/major_projects/PBC%20Workshop%20Report%2011-13%20April%202007%20final.pdf, accessed 23 October 2007.
- 16 Australian Government Attorney General's Department, Native Title Ministers Meeting, 15 December 2006, Canberra, Available online at: http://www.ag.gov.au/www/agd/agd.nsf/Page/Indigenoulawandnativetitle_Nativetitle_Nativetitleministersmeeting-15December2006Canberra, accessed 24 October 2007.
- 17 Australian Government Attorney General's Department, Native Title Ministers Meeting, 15 December 2006, Canberra, Available online at: http://www.ag.gov.au/www/agd/agd.nsf/Page/Indigenoulawandnativetitle_Nativetitle_Nativetitleministersmeeting-15December2006Canberra, accessed 24 October 2007.
- 18 A 'default' body may be determined to perform the functions of a PBC in the absence of a body nominated by the native title holders. Attorney-General's Department, the Office of Indigenous Policy Coordination and the Office of the Registrar of Aboriginal Corporations, Structures and Processes of Prescribed Bodies Corporate, p28, available online at: [http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(CFD7369FCAE9B8F32F341DBE097801FF\)~c0000ReporttoGovernmentNativeTitlePrescribedBodiesCorporatePBCs.pdf/\\$file/c0000ReporttoGovernmentNativeTitlePrescribedBodiesCorporatePBCs.pdf](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(CFD7369FCAE9B8F32F341DBE097801FF)~c0000ReporttoGovernmentNativeTitlePrescribedBodiesCorporatePBCs.pdf/$file/c0000ReporttoGovernmentNativeTitlePrescribedBodiesCorporatePBCs.pdf), accessed 9 August 2007.
- 19 *Native Title Act 1993* (Cth), s59 and s60.
- 20 Native Title Amendment (Technical Amendments) Bill 2007, *Explanatory Memorandum*, p76, available online at: [http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(878CAEAF8D7CA41B4CD31727CCC28450\)~Explanatory+Memorandum++Native+Title+Amendment+\(Technical+Amendments\)+Bill+2007.pdf/\\$file/Explanatory+Memorandum+Native+Title+Amendment+\(Technical+Amendments\)+Bill+2007.pdf](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(878CAEAF8D7CA41B4CD31727CCC28450)~Explanatory+Memorandum++Native+Title+Amendment+(Technical+Amendments)+Bill+2007.pdf/$file/Explanatory+Memorandum+Native+Title+Amendment+(Technical+Amendments)+Bill+2007.pdf), accessed 18 October 2007.