



Chapter 5

Changes to prescribed bodies corporate

PBCs find themselves, for the most part, without income or readily available assets, and without the necessary skills to be able to generate them.¹

Good functioning of prescribed bodies corporate (PBC)² is essential to native title. Recognition of native title rights only goes part of the way to redress the historical injustice of land dispossession. Without appropriate means to make decisions about land, the existence of native title makes minimal appreciable difference to Indigenous people.

Native title holders require the means to engage with non-Indigenous interests to exercise all of their rights and obligations to land. Article 1 of both the *International Covenant on Economic, Social and Cultural Rights*, and the *International Covenant on Civil and Political Rights* is clear:

... all peoples have the right to self determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Prescribed bodies corporate contribute to Indigenous self-directed development for the future, and provide a mechanism which can facilitate the exercise and enjoyment of Indigenous peoples' human rights.

To ensure Indigenous peoples' human rights are protected, I believe there is a need to review the impact of the 2007 changes to the *Native Title Act 1993* (Cth) (the Native Title Act) on Indigenous native title holders and their corporations that hold native title. I consider the changes in the context of the *Structures and Processes of Prescribed Bodies Corporate (PBC Report)*.³ The changes implemented the findings and recommendations of that report. Changes affecting other representative Indigenous bodies, principally, native title representative bodies (NTRBs), I consider in an earlier chapter in this report.

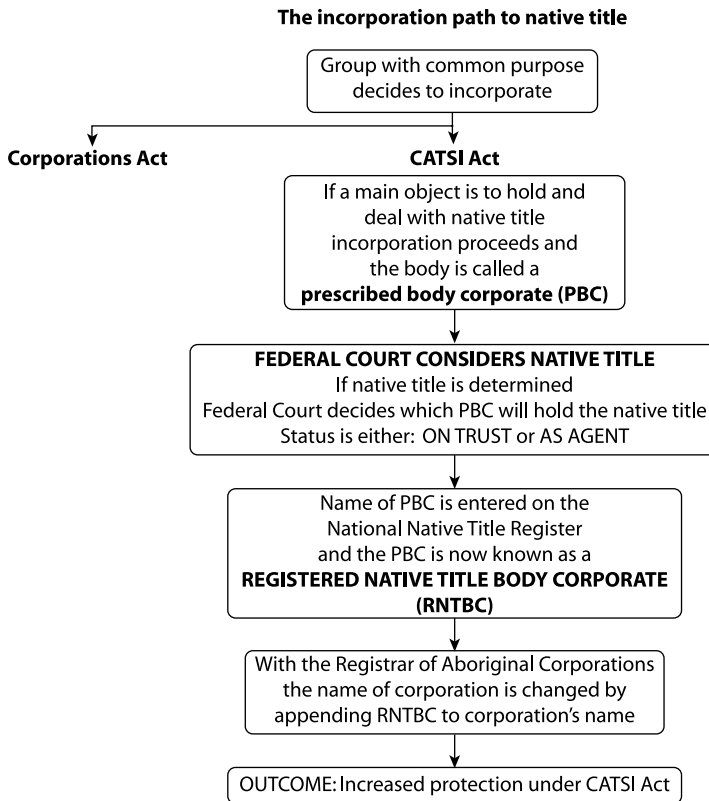
PBCs?

A prescribed body corporate is an Indigenous incorporated body created under the Native Title Act. The prime object of a PBC is to hold native title on trust or as agent for the native title holders. Upon incorporation under the *Corporations (Aboriginal and Torres Strait Islander) Act 2007* (Cth) (the CATSI Act) the PBC is entered on the Register of Aboriginal and Torres Strait Islander Corporations. When the Federal Court determines that native title exists it goes on to determine which PBC is to hold it. The PBC will be added to the National Native Title Register as a registered



native title body corporate (RNTBC). Its name is then changed to include the letters 'RNTBC'. RNTBCs denotes that it is a registered native title body corporate. RNTBCs gain increased protection under the CATSI Act (see the chapter on the CATSI Act later in the report).

Despite the technical difference in terminology, this chapter discusses the *PBC Report*, and thus I follow its use of the term 'PBC' to cover both PBCs and RNTBCs.



The primary roles of PBCs are to:

- protect and manage determined native title, in accordance with the native title holders' wishes; and
- provide a legal entity through which native title holders can conduct business with government, and others, interested in accessing or regulating native title lands and waters.⁴

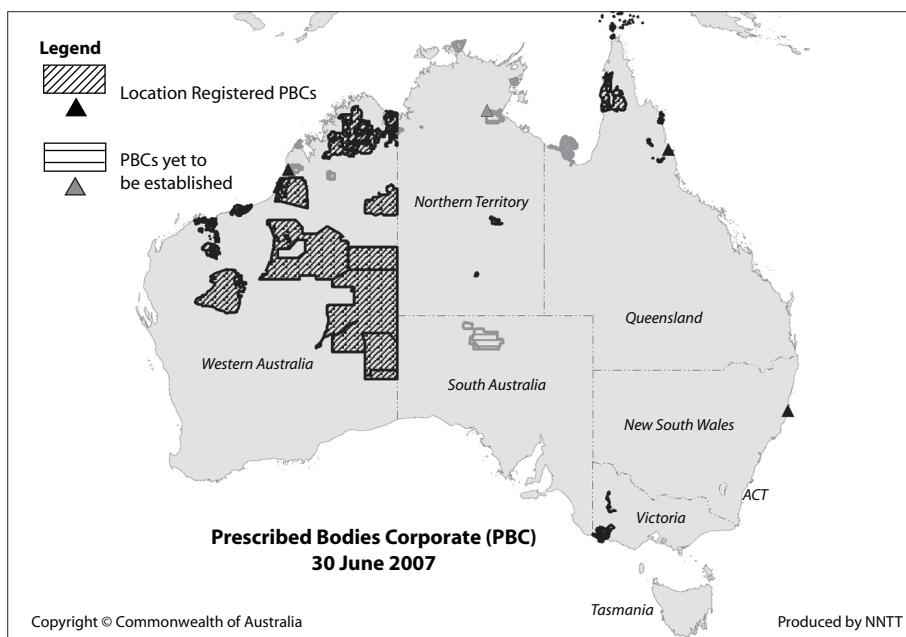
Scale

As an indication of scale:

- On 30 May 2007: of the 69 claimant determinations recognising native title, there were 49 RNTBCs determined, and 11 RNTBCs still waiting to be determined.⁵ (The imbalance occurs because some RNTBCs hold more than one determination.)



- The changes to the Native Title Act allow native title representative bodies (NTRBs) to provide support to RNTBCs through their operational funds. There are currently 10 NTRBs that have RNTBCs within their representative boundary.



The following table shows RNTBCs supported by NTRBs.⁶

| RNTBCs supported by NTRBs | | |
|---------------------------------------|--------------|-----------|
| NTRB area | State | No |
| New South Wales Native Title Services | NSW | 1 |
| Central Land Council | NT | 2 |
| Northern Land Council | NT | 1 |
| Cape York Land Council | QLD | 4 |
| North Queensland Land Council | QLD | 4 |
| Torres Strait Regional Authority | QLD | 20 |
| Native Title Services Victoria | VIC | 2 |



| | | |
|---|--------------|-----------|
| Kimberley Land Council | WA | 5 |
| Ngannytjarra Council (now Central Desert Native Title Services) | WA | 5 |
| Yamatji Marlpa Barna Baba Maaja Aboriginal Corporation | WA | 5 |
| | Total | 49 |

Background to the changes

In October 2006, the Australian Government released the *PBC Report* examining the structures and processes of PBCs. The *PBC Report* led directly to amendments to the Native Title Act, that relate specifically to PBCs.⁷ The amendments were passed in 2007.

The report was developed by a steering committee made up of representatives of three Australian Government departments.

The committee consulted a range of stakeholders about the functions and governance models of PBCs. Included were PBCs, native title representative bodies (NTRBs), state and territory governments, and industry bodies.

The *PBC Report* examined the structures and processes of PBCs, and included 15 recommendations that aim to achieve the following outcomes:

- improve the ability of PBCs to access and utilise existing sources of assistance, including from NTRBs;
- improve the flexibility of PBC governance to accommodate the specific interests and circumstances of the native title holders;
- better align existing sources of potential assistance with PBC needs; and
- encourage state and territory government involvement in serving PBC needs.⁸

I have to agree with the then Attorney-General that the report found:

there was considerable scope to improve the flexibility of the governance regime for the performance of native title functions.⁹

A key finding of the *PBC Report* was that the needs of PBCs differ greatly, depending on factors such as location and potential for future act activity within PBCs. Further there needed to be better coordination of existing resources for PBCs.

The government committed to implement all 15 recommendations of the *PBC Report* – they are summarised in an Appendix to this report.

Effects of changes on PBCs

The changes I refer to are those made by amendments to the Native Title Act by the *Native Title Amendment Act 2007* (Cth) (the NTAA) and the *Native Title (Technical Amendments) Act 2007* (Cth) (the Technical Amendments Act). There have also been changes to policy, processes and programs.



The changes impact on:

- support for PBCs;
- PBCs charging a fee for service;
- consultation and consent; and
- default, replacement, and subsequent PBCs.

Support for PBCs

PBCs need support in financial and other ways. The *PBC Report* suggested that, of the PBCs established, most struggle to meet obligations.¹⁰

The extent to which PBCs need support depends on the capacity of the PBC and the environment in which they operate. However, even those PBCs that are considered good examples also find it difficult to meet their native title functions and ongoing administration. To remain operational when support is inadequate, native title holders can be forced to compromise their future native title rights and responsibilities. For example, Lhere Artepe had to sell lands acquired through native title negotiations to cover administrative costs.¹¹

The National Native Title Council was concerned about the significant amount of work officers of PBCs are responsible for, and the level of understanding required to undertake their responsibilities.¹² For example:

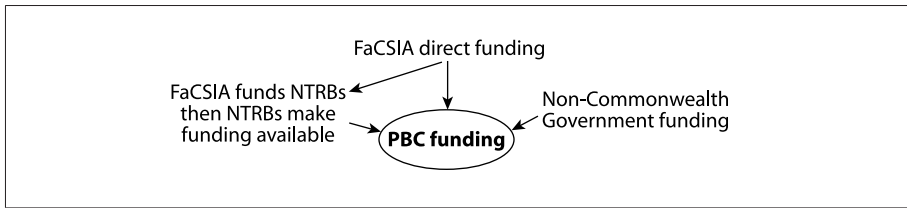
- all official correspondence and dealings with the native title holding group must go through the PBC;
- they need a detailed understanding of the future act regime and the rights of native title holders; and
- there are general administrative requirements like membership records and minutes of meetings.

Financial support

There is no doubt of the need for unfettered baseline establishment and operational funding to enable PBCs to make their initial applications for funding.¹³ While legislative changes have been made to ensure that NTRBs¹⁴ can apply on behalf of PBCs for establishment and operational funds as part of their annual funding submissions, PBCs are also able to apply independently.¹⁵

FaCSIA issued *Guidelines for Support of Prescribed Bodies Corporate (PBCs)* (the *PBC Guidelines*) on how they will deal with funding. (After the 2007 election FaCSIA was changed to the Department of Housing, Community Services, and Indigenous Affairs (FaHCSIA). FaHCSIA now administer the guidelines.) FaHCSIA is to ensure that NTRBs give appropriate priority to assisting PBCs when funding NTRBs under their program funding agreements by:

- FaHCSIA allowing NTRBs to use their native title program funding to assist PBCs with their day-to-day operations (with FaHCSIA's prior approval); and
- FaHCSIA may consider direct funding for PBCs (ie. funding provided other than through NTRBs) to assist with day-to-day operating costs in limited circumstances.¹⁶



While the Commonwealth's preferred option is for PBCs to be supported by NTRBs, independent funding would ensure a greater degree of autonomy or self determination for the PBC and the native title holders, after determination.

However, PBCs and NTRBs were informed that:

Under the draft guidelines, funding will not be provided for more than one financial year. FaCSIA's existing priority of funding NTRBs/NTSPs for claims processing will remain, and that there will be *no additional funding* in the native title system specifically for PBCs – at least in the next financial year.¹⁷

Information and procedures for PBCs to make application for funding independent of the NTRB/NTSP¹⁸ is provided in the *PBC Guidelines*.¹⁹ Such applications would be considered in exceptional circumstances and PBCs would have to seek agreement from the Land Branch of the Office of Indigenous Policy Coordination within FaHCSIA. Exceptional circumstances may include:

- that the original claim was not handled by the NTRB/NTSP in the area;
- that there is a significant conflict of interest between the PBC and the NTRB/NTSP;
- circumstances precluding funding being provided via the NTRB/NTSP such as unworkable relationships;
- demonstrated good governance; and
- demonstrated ability to administer and account for the funding.

The Attorney-General promoted the changes acknowledging:

... that the current processes remains expensive and slow. The proposed measures are intended to ensure that the existing processes work more effectively and efficiently in securing outcomes.

The government has expressed views, and made conditions, about the funding of PBCs. These include:

- It is a condition of applications direct from PBCs that, where the reasons for direct application include reference to an NTRB/NTSP, a copy will be forwarded to the NTRB/NTSP for comment.²⁰
- The opinion that:
The Native Title Act provides for NTRBs/NTSPs to assist PBCs in the exercise of their statutory functions and suggested that it would be illegal for FaCSIA to fund PBCs to carry out these function as the Native Title Act clearly gives these functions to NTRBs/NTSPs, and the Native Title Act provides that a PBC cannot be recognised as an NTRB.²¹



- The view:
 - that it is not solely responsible for funding PBCs, and that it is appropriate that the States and Territories and proponents of activity, who are the primary beneficiaries of land development, contribute to the costs of such development, including the costs of bodies corporate with whom they negotiate.²²

These views, as well as the new guidelines raise concerns. It is not possible at this stage to assess how successful the new funding arrangements will be. The government needs to give close attention to dealing with these concerns when administering the funding and implementing the guidelines. This is necessary to ensure the effective functioning of the native title system. As measured by the extent to which the Native Title Act is delivering on its objects, taking into consideration the matters set out in the preamble.

Concerns

- The potential for intra-Indigenous disputes that may result from a copy of an application for direct funding being forwarded to the NTRB/NTSP for comment. This may lead to the denial of subsequent applications by a PBC for NTRB/NTSP assistance.
- Where PBCs apply directly for funding from the Land Branch of the Office of Indigenous Policy Coordination, FaHCSIA, there is no provision for internal review of the decision, which presumably is final. (This is unlike NTRB/NTSP requests.)
- Free, prior and informed consent of Indigenous people may be restricted because of the amount of discretion that the Land Branch Manager, FaHCSIA, can exercise.
- There may be a lack of confidentiality, certainty and stability, and redress for disputed decisions.
- PBCs do not have adequate resources to perform their functions. This is the primary concern of native title holders in relation to the operation of PBCs, rather than any problem inherent in the functions of PBCs themselves.²³
- Shifting of responsibility for funding from Federal to state and territory governments, and proponents of activities, may result in PBCs not being properly funded from any source or unduly pressured by the non-government (proponents of activities) funder.

Non-financial support

The Australian Government does not directly provide non-financial resources such as governance training and capacity building to PBCs. Instead it funds the Office of the Registrar of Aboriginal and Torres Strait Islander Corporations (ORATSIC)²⁴ to provide programs that assist PBCs with such requirements.



The government's Indigenous economic development policy must also consider the limitations of PBCs and acknowledge that, without the capacity to operate effectively, the ability to meet their native title responsibilities and economic and community development aspirations are neutered. This was a significant frustration arising from stakeholders who participated in the 2006 National Survey.²⁵

In policy and planning, there is potential for high-level interaction between native title bodies and government service providers through decision-making processes which incorporate the whole of government. I endorse the recommendations of the *PBC Report*, that government actively promote measures for providing support to PBCs through SRAs and RPAs. Shared Responsibility Agreements (SRAs) and Regional Participation Agreements (RPAs) may be ideal instruments through which to negotiate resources and support for native title projects. It is important to make the distinction that SRAs will support PBC projects, though they will not directly resource PBC entities.

SRA negotiations may be useful for assessing and agreeing to a range of collaborative projects as well as giving the respective bodies an understanding of resource requirements and resource availability. In using them this way we must be conscious of creating extra burdens on under-resourced PBCs. These burdens may result from partnerships and joint ventures, particularly where the government requires mutual responsibility.

Fee for service

The *PBC Report* examines the ability of PBCs to charge a third party to a negotiation for costs and disbursements reasonably incurred in performing its statutory functions.

The *PBC Report* found that:

Under the existing legislative regime, PBCs are not able to seek reimbursement from or charge third parties for cost and disbursements expended or incurred (or estimated to be expended or incurred) by the PBC in performing its functions under the NTA or the PBC Regulations. Essentially, this is because a fee may only be charged for the performance of a statutory duty or function if the statute provides for such a charge either expressly or by necessary implication.²⁶

The *PBC Report* argues that:

While [the existing legislative regime] would probably not prevent the PBC from applying moneys obtained through an agreement to offset its negotiation costs, it would be preferable to provide clear authority for PBCs to recover the costs incurred in performing its functions.²⁷

The government responded positively by amending the Native Title Act, to allow PBCs to charge a fee for service.²⁸ Division 7 of the Native Title Act (due to commence on 1 July 2008) includes provisions relating to:

- fees for services provided by PBCs in performing certain functions; and
- opinions of the Registrar of Aboriginal and Torres Strait Islander Corporations.

The National Native Title Council (NNTC) raised concerns during the consultation process, that over-regulation of the regime would restrict, rather than enable, PBCs' ability to charge fees.



In particular, they were concerned that additional discretionary powers would allow the Registrar of Aboriginal and Torres Strait Islander Corporations:

- to make binding opinions about whether fees are or not payable; and
- to advise that payment be withheld where an opinion is sought.

Amendments to the PBC Regulations to provide for procedures related to PBCs recovering costs were not finalised in 2007. I understand they are currently in the process of drafting.

The NNTC considered that if the amended regulations do not provide a clear framework then:

- fees which are properly owed to a PBC may remain outstanding for an unlimited period of time, pending a decision from the registrar;
- no right of redress by the PBC to either compel the assessment of the application in a timely manner, or the payment of the fees owing; and
- there may be no opportunity afforded to a PBC to make submissions to the registrar on the reasonableness of the fee charged.²⁹

Amended regulations need to make provision for a process for seeking an opinion of the registrar, that is consistent with the principles of natural justice. The process needs to ensure that the PBC affected by the decision has the opportunity to be heard and to present their argument on the reasonableness of the fee charged. Also, as the opinion of the Registrar is binding, there should be some internal or external appeal mechanism if either party does not agree with the opinion of the registrar.

The Minister for Families, Housing, Community Services and Indigenous Affairs³⁰ and the Attorney-General should ensure that processes developed for requesting the opinion of the registrar do not further limit or disadvantage PBCs in their attempts to recover costs from other parties. I refer to my recommendations at the end of the chapter.

Consultation and consent

The Native Title Act prior to amendment included provisions for consultation and consent which provided an additional level of protection for recognised native title rights and interests. This was achieved by ensuring that the entity charged with the management of the title conscientiously ascertained:

- what and whose interests may be affected by a future act; and
- who those interests are held by, according to the customary law of the native title holders.

The amendments to the Native Title Act³¹ have removed the legal protection that ensured that PBCs have an obligation to consult native title holders about future acts. Thus, native title holders may not be properly informed about future acts, and will have no opportunity to give their specific consent.

This has been done by:

- limiting the circumstances where a PBC has to consult with native title holders about future acts (by amending Section 58 of the Native



Title Act, and allowing for 'standing authorisations' in accordance with Recommendation 6 of the *PBC Report*); and

- proposed amendments to the definition of 'native title decisions' (as contained in the *Native Title (Prescribed Bodies Corporate) Regulations 1999*) as detailed in the *PBC Report*, but yet to be finalised in the amendments to the Regulations.

Native title decisions

As it currently stands, Regulation 8(1) of the PBC Regulations defines a 'native title decision' as:

... a decision:

- (a) to surrender native title rights and interests in relation to land or waters;
- or
- (b) to do, or agree to do, any other act that would *affect* the native title rights or interests of the common law holders. (emphasis added)

The proposed changes to the PBC regulations provide that the requirements for PBCs to consult with and obtain the consent of native title holders on native title decisions are limited to decisions to surrender native title rights and interests in relation to land and waters.³²

This proposal is based on the argument that compulsory consultation imposes a:

... very significant burden on some PBCs and that compulsory consultation should only be applied to decisions to surrender native title rights and interests in land or waters.³³

Section 227 of the Native Title Act sets out when an act *affects* native title:

An act ***affects*** native title if it extinguishes the native title rights and interests or if it is otherwise wholly or partly inconsistent with their continued existence, enjoyment or exercise.

In addition to being a 'native title decision' for the purposes of the PBC consultation and consent provisions an act affecting native title, but not necessarily extinguishing it, is also a future act.

In effect, the proposed amendments will limit the kinds of future acts that PBCs are required to consult native title holders about, and obtain consent for – to only those decisions whereby native title is *surrendered*.³⁴

The mere giving of notice of a future act to a PBC, without an obligation on the PBC to consult about that act, means that native title holders will not be appropriately informed about that act or the effect of it on their native title rights and interests, and will have no opportunity to give their specific consent to it.³⁵

Consultation with, and the consent of, native title holders to activity on native title land is critical to:

- the validity of future act agreements;
- the ability of native title holders to protect their native title rights and interests, in order to regulate the use of and activity on native title land; and



- the legitimacy of future acts, in the sense that they represent the discharge of the state's obligations to Indigenous peoples, most relevantly, the right to prior informed consent.

Standing authorisations

Native title holders are required to authorise the doing of acts that affect native title rights and interests. Currently, Regulation 9(2) of the PBC Regulations allows native title holders to issue 'standing authorisations'³⁶ to PBCs to certify their compliance with the consultation and consent requirements:

- (a) the common law holders have been consulted about, and have consented to, the proposed decisions; or
- (b) that:
 - (i) the proposed decision is of a kind about which the common law holders have been consulted; and
 - (ii) the common law holders have decided that decisions of that kind can be made by the body corporate.³⁷

In accordance with Regulation 9(3), such authorisations must also be signed by five members of the PBC whose native title rights and interests are affected by the proposed decision.

The *PBC Report* argued that these provisions 'undermine the efficiency of process and required streamlining as they are complicated and difficult to implement in practice'.

Proposed amendments to the PBC regulations, aim to clarify the circumstances in which 'standing authorisations' are issued to a PBC, and make provision that only one certificate need be provided in connection with *each* decision which is the subject of a standing authorisation.

In practice, this means that where, for example there are low impact cultural heritage matters, the PBC gains authorisation from the native title group to approve that act *on all future occasions*. The PBC would not be required to notify, consult with, or obtain consent from, the native title group except in the first instance.

One reading of the current Regulation 9(2) allows a PBC to certify their compliance with the consultation and consent functions by engaging with the whole native title holding group in relation to a particular future act. It also allows a PBC to obtain an authority from the native title holding group to consult and obtain consent in a particular way. For example, the group could authorise the PBC to consult with particular individuals regarding a particular class of future acts proposed in a particular area of the determination area.

The recommendation put forward by the *PBC Report* would suggest that the proposed amendment would authorise the doing of a certain class of future act by the PBC without consulting the native title holders in each instance. This would allow the native title holders to issue a broad executive authority to a PBC to make native title decisions on its behalf. Such an interpretation is at odds with overall purpose of the consultation and consent provisions.



As I have previously identified in my submissions in regard to the changes to the native title system,³⁸ the real problem lies with the requirement of five signatures of members of the PBC whose rights and interests are affected by the future act.

Not all native title holders identified in a native title determination must become members of the PBC. It may be that relevant 'affected common law holders' are not members of the PBC. Sub-regulation 9(4) provides that where this is the case, the authority must be signed by five members and all of those PBC members whose rights are affected. This does not, however, cover the situation where no 'affected common law holders' are current members of the PBC. It also highlights the problem of how an 'affected common law holder' can be identified (and signature obtained) in the absence of a particular proposed future act/native title decision.

In order to maintain the integrity of the consultation and consent provisions and ensure that they do not negate traditional law and custom, any amendments to Regulation 9 must ensure that consultation and consent requirements have been discharged pursuant to a 'procedural' authorisation. Certification of such discharge should be issued by the PBC together with the 'affected common law holders', whether or not they are members of the PBC. Such an approach would:

- be consistent with other authorisation procedures³⁹ in the Native Title Act, which distinguish, for example, between the native title holding group and the named applicants;
- allow non-compliance with authorised procedures to be enforceable as part of the statutory scheme and therefore affect the validity of agreements not complying with them; and
- provide for adequate and appropriate consultation with native title holders in relation to decisions affecting their land, in terms of both the procedure adopted and decision itself.

The *PBC Report* argued that the proposed amendments would be counteracted by the ability of native title holders to impose additional consultation and consent requirements on their PBC, through the PBC's constitution. This is provided for under the CATSI Act.⁴⁰

However, the government must take into account that many PBCs may not have the capacity, or access to legal advice to ensure that these protections are included in the PBC's constitution to ensure it complies with statutory obligations and traditional law and custom. Under the CATSI Act the inclusion of these protections in the constitution of a PBC is subject to the registrar's discretion to approve the constitution.

Without legislative support, the proposed amendments will not guarantee the rights that are currently protected by the consultation and consent provisions, and there will be no consistent standard against which they can be measured.

Consequently, the proposed amendments to the Native Title (Prescribed Bodies Corporate) Regulations 1999 places the responsibility to protect interests heavily on Indigenous people and, in particular, the PBC officers. I am concerned that the proposed changes tend to ensure the protection of the interests held by others, such as future acts (which are predominantly the interests of non-Indigenous stakeholders), over those of the native title holders.



The legislative and proposed regulatory amendments relating to PBCs, impose a process that potentially conflicts with the decision-making processes of native title holders. In accordance with the Native Title Act, PBCs must consult with and obtain the consent of ‘common law holders’ of native title before making a ‘native title decision’.

I believe that there should be maximum participation in decisions, and free, prior and informed consent.

Default, replacement, and subsequent PBCs

Default PBCs now

Prior to the Native Title Act amendments, there were no provisions for prescribing default PBCs.

The *PBC Report* notes:

There have been several occasions where the Federal Court has allowed a delay between a determination of native title and the establishment of a PBC, and in some cases it has been several years. This has resulted in considerable uncertainty for third parties in relation to dealings concerning relevant land.⁴¹

To deal with this problem, and in response to recommendations in the *PBC Report*, the amendments were made to provide for default PBCs.

The Federal Court can, as a result of the amendments, determine a ‘default PBC’ in circumstances:

- where the common law holders fail to nominate a PBC in conjunction with a native title determination;⁴²
- where a liquidator is appointed to a PBC;⁴³ and
- at the initiation of the common law holders.⁴⁴

Situations where the common law holders may initiate the nomination of a default PBC can include:

- the common law holder requests that a trust be terminated;
- the Federal Court determines that a PBC holds the rights and interests from time to time comprising the native title in trust for the common law holders; and
- the common law holders require the replacement of a PBC.⁴⁵

A number of concerns were raised (in submissions to the change process) about allowing regulations to prescribe not only the kinds of body corporate that may be determined (as a trust-PBC or an agent-PBC) but also the actual body corporate that will be the trust or agent-PBC. It was considered “to be a ‘radical shift’ in the current legislative policy – that regulations may be used to ‘dictate’ to native title holders, which body will hold their native title, and/or act as their exclusive agent for the protection and management of their native title.”⁴⁶

The intention was that the amended Section 60 of the Native Title Act would provide for the court to determine a ‘default PBC’. The Explanatory Memorandum to the Bill stated that a default-PBC must be an agent-PBC.⁴⁷ However this is not made clear in the new legislation, and it could be suggested that the court would determine the kind of PBC, but does not state specifically that it is to be an agent-PBC. This



decision will have an affect on how the native title holders are represented, and will determine the functions that a PBC will be required to undertake.

A crucial element, for the appropriate conduct of a default PBC, is the inclusion of specific requirements for native title holders to ensure the extra consultation and consent measures that would normally be available to them in the constitution of their PBC. This would provide added certainty that decisions about native title rights and interests made on behalf of the native title holders can not be made without appropriate free, prior and informed consent.

The *PBC Report* asserted:

That the use of a default PBC should be an option of last resort, and should serve as an interim measure to provide a point of contact for third parties pending the establishment or re-establishment, of a PBC nominated by the native title holders. The default PBC functions should be limited to exercising the procedural rights attached to the native title under the Native Title Act ...

It is particularly important with regard to Indigenous self-governance that default PBCs are an interim measure only which is called upon as a last resort. To ensure this, in the lead up to making a determination of native title, the CATSI Act requires evidence that the corporation is ready to incorporate.⁴⁸ This is to facilitate sustainability. The Federal Court also may play a more assertive role. The court could ensure that a PBC has been nominated and is fully prepared to take on their statutory obligations to hold or manage native title rights and interests at the time of the determination.

Default PBCs under review

At the time of this report the government was drafting legislative and regulatory amendments that provide for default PBCs. It is recommended that the concerns raised in submissions to the change process that relate to this matter are seriously considered when drafting.

Other issues that require consideration include:

- the inclusion of specified default time period;
- whether the appointment of a default PBC is renewable;
- the inclusion of review processes for the default period and determinations made by the Court;
- where a liquidator has been appointed, and a default PBC determined by the Federal Court: what support will be provided to assist the native title holders to develop an appropriate structure to suit their needs and capacity to ensure its successful operation;
- where a liquidator has been appointed and native title holders wish to regain control of the protection and management of their native title: a process that facilitates the transition from the default PBC to a structure that is appropriate and nominated by the native title holders;
- that the proposed legislative and regulatory amendments providing for default PBCs, are considered together with the amendments already made to the Native Title Act and the PBC Regulations;



- that default PBCs are an interim measure to be used only as a last resort; and
- that the Federal Court play a more assertive role in ensuring that a PBC has been nominated and is fully prepared to take on its statutory obligations to hold or manage the native title rights and interests at the time of the determination.

Replacement PBCs

Section 60 of the Native Title Act has been amended to strengthen the provisions allowing the replacement of an agent-PBC.

It was argued that this provision restricted the capacity of PBCs by not allowing an agent-PBC to be replaced by a trust-PBC, or a trust-PBC to be replaced by an agent-PBC.⁴⁹

The amendments to the Native Title Act aim to remedy the deficiencies by providing that regulations allow for the replacement of PBCs at the initiation of the common law holders. This will be particularly useful in cases where the common law holders wish to replace the original PBC with a more appropriate structure. The replacement provisions are also applied where a liquidator is appointed for the original PBC and the Federal Court has determined the replacement PBC.⁵⁰

PBCs for subsequent determinations

The Native Title Act⁵¹ and PBC Regulations⁵² have been amended to allow an existing PBC to be determined as a PBC for subsequent determinations of native title. These changes respond to recommendations of the *PBC Report*.⁵³

The intent of the changes was to allow PBC infrastructure and resources to be used by more than one group of native title holders, thereby encouraging economies of scale and better use of the limited resources available to the PBC sector. It may also enable a more coordinated management of native title on a regional basis.⁵⁴

Prior to the changes the PBC Regulations⁵⁵ only allowed this to occur in circumstances where all the members of the existing PBC were also the native title holders in relation to the subsequent determination.⁵⁶

The changes to the PBC Regulations allow an existing PBC to be determined by the court as a PBC for subsequent native title determinations if *all* common law holders agree. For example, the Kunin (Native Title) Aboriginal Corporation could have been approached to become the subsequent PBC for the Rubibi community who are waiting to have their PBC determined.

However, in the instance of a PBC for subsequent determinations, an existing trust-PBC could only be determined as a subsequent trust-PBC (not an agent-PBC) and vice versa.⁵⁷

Section 59A(3) of the Native Title Act allows regulations to prescribe how the consent may be obtained of both the common law holders for the existing PBC, and the common law holders proposing to use the existing PBC.



According to Regulation 4 of the PBC Regulations, a PBC is an Aboriginal and Torres Strait Islander corporation where all its members are people:

- who, at the time of making the native title determination – and at all times after the determination is made – are included or proposed to be included in the native title determination as native title holder; and
- have native title rights and interests in relation to the land or waters to which the native title determination relates.

Therefore as it currently stands, it appears that the changes may be contradictory to the definition of a PBC in Regulation 4. My concern is that in order for the changed regulation to operate effectively Regulation 4, which is integral to ensuring the right people constitute the membership of the PBC, will need to be amended in the future.

If this future amendment removes the requirement for members of PBCs to be holders of native title rights and interests in *that* land, it allows PBCs to negate the traditional law and custom for that area by not ensuring the right people are consulted and making decisions for their country.

Looking forward

Dysfunctional or under-resourced PBCs jeopardise the capacity of native title holders to exercise their rights and make informed decisions about their country. This can lead to extinguishment by stealth and/or instability and uncertainty, not only for native title holders, but also for government and third parties.⁵⁸

Significant time and resources have been given to the amendments and recommendations for PBCs. Such commitment shows the importance of PBCs to the success of the native title system. And there is also commitment of both government and Indigenous people, and their representatives, to ensure the successful operation of PBCs. Successful operation of PBCs must focus on maximising the needs and aspirations of native title holders.

It is important to acknowledge the government's willingness to work with Indigenous expertise such as the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS), NTRBs and PBCs to this end. All seek to identify the challenges they face, and to develop solutions that best support the exercise and enjoyment of Indigenous peoples' human rights.

Ongoing concerns

Looking back on this chapter, my overarching concern relates to consultation and consent. For native title, the most dangerous changes are reflected in the removal of legislative protection which ensured that PBCs have an obligation to consult with native title holders about decisions concerning their lands.

Other concerns, but none the less important, are:

- The need for financial and non-financial support for PBCs.
- The manner of regulation of the charging of fees for services provided by PBCs, including the registrar's discretionary decision-making powers.



The status of PBCs deserve a watchful eye – the creation of default PBCs, and the replacement and subsequent use of PBCs in particular. This is necessary to ensure that not only the human right of free, prior and informed consent is being satisfied, but also that traditional law and custom is adhered to and the right people are speaking for country.



Not all matters affecting PBCs could be mentioned in this chapter principally because the amendments have not been bedded in yet and PBCs have yet to experience the post-implementation effects. There are other matters that call for monitoring that I will undertake over the coming year but there is a need for more timely scrutiny of the implementation of the amendments.

Recommendations

- 5.1** That the Minister for Families, Housing, Community Services and Indigenous Affairs and the Attorney-General ensure that regulations which make provision for the development of a process – whereby requests to the registrar for an opinion about fees are made and considered – include a clear framework that:
- specifies a time period during which the registrar must give an opinion on whether a fee is to be paid;
 - requires that the registrar’s opinion about fees be accompanied by the reasons for the decision;
 - when the registrar is to give an opinion about fees, PBCs may make submissions;
 - provides for an appeal mechanism where there is disagreement with the registrar’s opinion, or where the procedures in the regulations have not been complied with.
- 5.2** That the Native Title Act and Regulations be changed to specify default times and review processes for default PBCs.
- 5.3** That efficient use of resources and infrastructure be fostered by allowing an existing PBC to be determined as a PBC for subsequent determinations of native title.
- 5.4** That AIATSIS (with the support of ORATSIC) monitor the changes to PBC legislation as part of its Prescribed Bodies Corporate Project, and report on the effectiveness of the changes relating to PBCs.



- 1 National Native Title Council, *Submission to Senate Legal and Constitutional Affairs Committee Inquiry into the Native Title Amendment Bill 2006*, p14.
- 2 For further discussion regarding Prescribed Bodies Corporate (PBC), also referred to as Registered Native Title Bodies Corporate (RNTBC), see the chapter on the CATSI Act.
- 3 Australian Government Attorney-General's Department, *Structures and Processes of Prescribed Bodies Corporate*, 27 October 2007.
- 4 Australian Government Attorney-General's Department, *Structures and Processes of Prescribed Bodies Corporate*, 27 October 2007.
- 5 Australian Institute of Aboriginal and Torres Strait Islander Studies, Native Title Research Unit, *Registered Native Title Bodies Corporate National Overview*, June 2007, p15, available online at: [http://ntru.aiatsis.gov.au/major_projects/nationaloverview\(may\).pdf](http://ntru.aiatsis.gov.au/major_projects/nationaloverview(may).pdf), accessed 12 October 2007.
- 6 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, p4, available online at: http://ntru.aiatsis.gov.au/major_projects/PBC%20Workshop%20Report%2011-13%20April%202007%20final.pdf, accessed 23 October 2007.
- 7 Australian Government Attorney-General's Department, *Structures and Processes of Prescribed Bodies Corporate*, 27 October 2007.
- 8 Attorney-General's Department and the Department of Families, Community Services and Indigenous Affairs, *Submission to the Senate Standing Committee on Legal and Constitutional Affairs, Inquiry into the Native Title Amendment Bill 2006*, p11.
- 9 Ruddock, P., (Attorney-General), Keynote address to the Examining the reforms to the Native Title System Negotiating Native Title Forum, 22 February 2007, p3, available online at <http://www.ag.gov.au/agd/WWW/MinisterRuddockHome.nsf/Page/RWP453BC16E321F9CEBCA2572AC0081C55D>, accessed on 18 October 2007.
- 10 Australian Government Attorney-General's Department, *Structures and Process of Prescribed Bodies Corporate*, 27 October 2006, p6.
- 11 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, p13, available online at: http://ntru.aiatsis.gov.au/major_projects/PBC%20Workshop%20Report%2011-13%20April%202007%20final.pdf, accessed 23 October 2007.
- 12 National Native Title Council, *Submission to Senate Legal and Constitutional Affairs Committee Inquiry into the Native Title Amendment Bill 2006*, p14.
- 13 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Submission to Land Branch, Commonwealth Department of Families, Community Services and Indigenous Affairs (FaCSIA) on the Draft Guidelines for Support of Prescribed Bodies Corporate (PBC)*, 1 June 2007, p3.
- 14 The conditions on funding of NTRBs are set out in s203CA of the Native Title Act.
- 15 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.
- 16 Roche, G., Department of Families, Community Services and Indigenous Affairs, *Resources and PBCs*, Presentation delivered at the First National Meeting of PBCs, AIATSIS, Canberra, 12 April 2007 as cited in, 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, p21, available online at: http://ntru.aiatsis.gov.au/major_projects/PBC%20Workshop%20Report%2011-13%20April%202007%20final.pdf, accessed 23 October 2007. Also see 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.
- 17 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, p22, available online at: http://ntru.aiatsis.gov.au/major_projects/PBC%20Workshop%20Report%2011-13%20April%202007%20final.pdf, accessed 23 October 2007.
- 18 Native Title Service Providers (NTSPs) provide similar professional services to NTRBs in accordance with the *Native Title Act 1993*.
- 19 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.
- 20 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Submission to Land Branch, Commonwealth Department of Families, Community Services and Indigenous Affairs (FaCSIA) on the Draft Guidelines for Support of Prescribed Bodies Corporate (PBC)*, 1 June 2007, p8.



- 21 Roche, G., Department of Families, Community Services and Indigenous Affairs, *Resources and PBCs*, Presentation delivered at the First National Meeting of PBCs, AIATSIS, Canberra, 12 April 2007 as cited in, 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, p22, available online at: http://ntru.aiatsis.gov.au/major_projects/PBC%20Workshop%20Report%2011-13%20April%202007%20final.pdf, accessed 23 October 2007.
- 22 Australian Government Attorney-General's Department, *Structures and Process of Prescribed Bodies Corporate*, 27 October 2006, p11.
- 23 Seiwart, R. (Senator, Greens), *Minority Report to the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Account*, Report on the Operation of Native Title Representative Bodies (March 2006).
- 24 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, p23, available online at: http://ntru.aiatsis.gov.au/major_projects/PBC%20Workshop%20Report%2011-13%20April%202007%20final.pdf, accessed 23 October 2007.
- 25 HREOC National Survey on Land, Sea and Economic Development 2006.
- 26 Australian Government Attorney-General's Department, *Structures and Process of Prescribed Bodies Corporate*, 27 October 2006, p25.
- 27 Australian Government Attorney-General's Department, *Structures and Process of Prescribed Bodies Corporate*, 27 October 2006, p25.
- 28 *Native Title Act 1993* (Cth), Part 2, Division 7, s60AB, s60AC, not yet included in the *Native Title Act 1993*. As cited in *Native Title (Technical Amendments) Act 2007*, Schedule 3, Item 7, commences on 1 July 2008.
- 29 National Native Title Council, Submission to Senate Legal and Constitutional Affairs Committee Inquiry into the Native Title Amendment (Technical Amendments) Bill 2006, p5.
- 30 Now the Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA).
- 31 Section 58(e)(1) of the Native Title Act previously provided for regulations to make provision that 'the common law holders have been consulted about, and have authorised, the agreements'.
- 32 Australian Government Attorney-General's Department, *Structures and Process of Prescribed Bodies Corporate*, 27 October 2006.
- 33 Native Title Amendment Bill 2006, *Explanatory Memorandum*, p73. See also Australian Government Attorney-General's Department, *Structures and Process of Prescribed Bodies Corporate*, 27 October 2006, p19.
- 34 'Surrender' is not defined in the Native Title Act. However, it is understood in the common law of native title to mean the voluntary giving up of native title or any right to claim native title and therefore it is assumed that the 'surrender' of native title extinguishes the title.
- 35 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Submission to the Senate Committee on Legal and Constitutional Affairs on the Inquiry into the Native Title Amendment Bill 2006*, 25 January 2007, para 158, p41.
- 36 Australian Government Attorney-General's Department, *Structures and Process of Prescribed Bodies Corporate*, 27 October 2006, p20.
- 37 *Native Title (Prescribed Bodies Corporate) Regulations 1999*, Regulation 9(2).
- 38 Aboriginal and Torres Strait Islander Social Justice Commissioner (on behalf of the Human Rights and Equal Opportunity Commission), *Submission to the Senate Committee On Legal and Constitutional Affairs on the Inquiry into the Native Title [Amendment] Bill 2006*, 25 January 2007, pp43-44.
- 39 *Native Title Act 1993*, (Cth), s203BE and s251A.
- 40 PBCs are required to register under the CATSI Act as an Aboriginal and Torres Strait Islander corporation prescribed for s59 of the *Native Title Act 1993* if it is registered for the purpose of being the subject of a s56 or s57 determination. See *Native Title (Prescribed Bodies Corporate) Regulations 1999*, Regulation 4(1). For more information about the CATSI Act and PBCs see the relevant chapters of this report.
- 41 Australian Government Attorney-General's Department, *Structures and Process of Prescribed Bodies Corporate*, 27 October 2006, p28.
- 42 See s59(2) of the *Native Title Act 1993* (Cth).
- 43 See s56(4)(d)(ii) of the *Native Title Act 1993* (Cth).
- 44 See s56(4)(d)(i), s56(7)(a), and (60)(a)(i) of the *Native Title Act 1993* (Cth).
- 45 See s56(4)(d)(i), s56(7)(a), and (60)(a)(i) of the *Native Title Act 1993* (Cth).
- 46 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Submission to the Senate Committee of Legal and Constitutional Affairs on the Inquiry into the Native Title Amendment (Technical Amendments) Bill 2007*, 26 April 2007, pp8-9 as cited in the Senate, Standing Committee on Legal and Constitutional Affairs Native Title Amendment (Technical Amendments) Bill 2007 [Provisions], May 2007, pp16-17.



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- 47 Native Title Amendment (Technical Amendments Bill 2007, *Explanatory Memorandum*, p78.
- 48 Corporations (Aboriginal and Torres Strait Islander) Bill 2005, *Revised Explanatory Memorandum*, p22, available online at: [http://www.comlaw.gov.au/ComLaw/Legislation/Bills1.nsf/0/0F4275A53180E60DC A25702F008122FE/\\$file/test05104EM.doc](http://www.comlaw.gov.au/ComLaw/Legislation/Bills1.nsf/0/0F4275A53180E60DC A25702F008122FE/$file/test05104EM.doc), accessed 7 November 2007.
- 49 Native Title Amendment Bill 2006, *Explanatory Memorandum*, p74, as cited in: The Senate, Standing Committee on Legal and Constitutional Affairs, *Native Title Amendment (Technical Amendments) Bill 2007 [Provisions]*, May 2007, p8.
- 50 See s60 of the *Native Title Act 1993* (Cth).
- 51 See s59A of the *Native Title Act 1993* (Cth).
- 52 Native Title (Prescribed Bodies Corporate) Regulations 1999, Regulation 5.
- 53 Attorney-General's Department, *Structures and Process of Prescribed Bodies Corporate*, 27 October 2006, p22.
- 54 Attorney-General's Department, *Structures and Process of Prescribed Bodies Corporate*, 27 October 2006, p21.
- 55 Native Title (Prescribed Bodies Corporate) Regulations 1999, Regulation 4.
- 56 For example, the Karajarri People's claim was the subject of two separate determinations, although one PBC manages the native title for both determinations, as cited in Attorney-General's Department, *Structures and Process of Prescribed Bodies Corporate*, 27 October 2006, p21.
- 57 See s59A(1) and s59A(2) of the *Native Title Act 1993* (Cth).
- 58 National Native Title Council, *Submission to Senate Legal and Constitutional Affairs Committee Inquiry into the Native Title Amendment Bill 2006*, p15.