

# **Structures and Processes of Prescribed Bodies Corporate**

## TABLE OF CONTENTS

<b>Summary of Recommendations</b> .....	<b>3</b>
<b>1. Background</b> .....	<b>5</b>
<b>2. Overview of the issues</b> .....	<b>5</b>
<i>The role of PBCs</i> .....	5
<i>Current and anticipated number of PBCs</i> .....	6
<b>3. Approach to the report</b> .....	<b>7</b>
<b>4. PBC functions and obligations</b> .....	<b>8</b>
<i>Requirement that a PBC be established</i> .....	8
<i>Native title functions</i> .....	8
<i>Corporate governance obligations</i> .....	9
<i>Native title related functions</i> .....	9
<i>Community expectations</i> .....	10
<b>5. Existing sources of assistance</b> .....	<b>10</b>
<i>Assistance from Native Title Representative Bodies</i> .....	11
<i>Assistance from the National Native Title Tribunal (NNTT)</i> .....	12
<i>Office of the Registrar of Aboriginal Corporations</i> .....	12
<i>Indigenous Land Corporation (ILC)</i> .....	13
<i>Indigenous Business Australia (IBA)</i> .....	13
<i>Office of Indigenous Policy Coordination</i> .....	13
<i>Australian Government portfolio agencies</i> .....	14
<i>State and Territory governments</i> .....	15
<i>The private sector</i> .....	15
<b>6. Resource needs</b> .....	<b>17</b>
<i>Basic establishment needs</i> .....	18
<i>Continuing needs and infrastructure</i> .....	18
<b>7. Reforms to the existing statutory governance model</b> .....	<b>19</b>
<i>Native title functions</i> .....	19
<i>Requirements for consultation and consent on ‘native title decisions’</i> .....	19
<i>Availability of ‘standing authorisations’</i> .....	20
<i>Enabling existing PBCs to assume functions for subsequent determinations</i> .....	21
<i>Broader membership options – non-native title holders as PBC members</i> .....	22
<i>Corporate governance obligations</i> .....	22
<b>8. Options to meet PBC resource needs</b> .....	<b>24</b>
<i>Ensuring NTRBs provide appropriate assistance to PBCs in relation to native title functions</i> .....	24
<i>Enabling PBCs to recover costs from other parties</i> .....	24
<i>Assistance with general operations and administration through provision of common services</i> .....	25
<i>Shared Responsibility Agreements</i> .....	26
<i>State and Territory land rights corporations</i> .....	27
<i>‘Default’ PBCs</i> .....	28
<b>Appendix 1 - Consultations</b> .....	<b>29</b>
<i>Written consultations</i> .....	29
<i>Discussions with stakeholders</i> .....	30
<b>Appendix 2 – List of Abbreviations</b> .....	<b>32</b>

## Summary of Recommendations

### Recommendation 1

5.7 The Australian Government should make clear to all stakeholders the extent to which NTRBs may currently assist PBCs following their establishment and incorporation.

### Recommendation 2

5.28 The Australian Government should arrange the preparation and maintenance of information packages for PBCs for each jurisdiction, outlining relevant State and Territory legislation, potential sources of assistance through Government grants and programs, as well as available information on support from the private sector.

### Recommendation 3

5.32 The Attorney-General and the Attorney-General's Department should press State and Territory Governments to agree to:

- place PBC establishment and needs on the agenda for consideration of all parties as a matter of practice when negotiating consent determinations or future act agreements, and
- actively promote a better understanding of the functions, needs and responsibilities of PBCs among other stakeholders in the native title system.

This should be done through multilateral forums, such as the Native Title Ministers' Meeting, as well as through bilateral meetings and consultations at ministerial and officer level.

### Recommendation 4

6.7 The Office of the Registrar of Aboriginal Corporations should coordinate the provision of relevant information on PBCs to native title claimants in the lead-up to the making of any native title determinations. This should include information and training on roles and responsibilities and related governance issues, and sound decision making-processes and record keeping. Such information could be provided with the assistance of the National Native Title Tribunal and the relevant Native Title Representative Body.

### Recommendation 5

7.7 The PBC regime should be amended to make clear that the statutory 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 or waters.

### Recommendation 6

7.12 The PBC regulations should be amended to clarify the circumstances in which 'standing authorisations' may be issued to a PBC, and, in particular, to provide that only one certificate needs to be issued with each authorisation.

### Recommendation 7

7.16 The PBC regime should be amended 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 to this.

### **Recommendation 8**

7.18 The PBC regulations should be amended 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.

### **Recommendation 9**

7.24 The Office of the Registrar of Aboriginal Corporations should develop and distribute appropriate educative material regarding obligations and requirements under the CATSI legislation to all PBCs and NTRBs. This should include:

- (a) a Guide to Good Governance specifically tailored to PBCs
- (b) model rules for PBCs, and
- (c) additional information as appropriate.

### **Recommendation 10**

8.4 The process for allocating funds to NTRBs should be modified to ensure that appropriate priority is given to the performance of NTRB functions associated with assistance to PBCs. NTRBs should be required to detail the nature and level of support which they expect to provide to PBCs, and to report on the implementation of such measures.

### **Recommendation 11**

8.10 The Native Title Act should be amended to 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. The amendments should also provide for an appropriate authority to investigate such arrangements on request, to ensure the costs were reasonably incurred.

### **Recommendation 12**

8.17 The General Terms and Conditions Relating to Native Title Program Funding Agreements should be amended to enable NTRBs to assist PBCs with their day to day operations in circumstances where this has been approved by the Office of Indigenous Policy Coordination.

### **Recommendation 13**

8.20 The Australian Government should, in consultation with State and Territory Governments, actively promote measures for providing support to PBCs via Shared Responsibility Agreements and/or Regional Partnerships Agreements.

### **Recommendation 14**

8.24 The Australian Government should 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.

### **Recommendation 15**

8.31 The Australian Government should note the need to develop a mechanism for the determination of a default PBC in appropriate circumstances. The Office of Indigenous Policy Coordination should develop a comprehensive proposal 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.

## 1. Background

1.1 In September 2005 the Government agreed upon a series of measures aimed at improving the efficiency and effectiveness of the native title system. The six interconnected elements of reform are:

- measures to improve the effectiveness of Native Title Representative Bodies (NTRBs)<sup>1</sup>
- reform of the native title respondents financial assistance program to encourage agreement-making rather than litigation
- preparation of exposure draft legislation for consultation on possible technical amendments to the *Native Title Act 1993* (NTA) to improve existing processes for native title litigation and negotiation
- an independent review of the claims resolution processes to consider how the National Native Title Tribunal (NNTT) and the Federal Court may work more effectively in managing and resolving native title claims
- increased dialogue and consultation with State and Territory governments to promote and encourage more transparent practices in the resolution of native title issues, and
- an examination of the current structures and processes of Prescribed Bodies Corporate (PBCs),<sup>2</sup> the bodies established to manage native title once it is recognised, with a view to finding ways to improve their effectiveness.

1.2 The last-mentioned element of the reforms is the focus of this report. Specifically, the Government agreed that the examination of PBCs should:

- identify their basic functions and resource needs
- ensure those functions and resource needs are aligned with existing funding sources from Australian Government, state and non-government sectors, and
- assess the appropriateness of the existing statutory governance model for PBCs.

## 2. Overview of the issues

### *The role of PBCs*

2.1 PBCs are a key element of the native title system, and the NTA envisages that eventually all dealings with native title holders will occur through PBCs. In seeking to accommodate native title within the Australian property law regime, the PBC model was adopted to provide a mechanism

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<sup>1</sup> In this report, the term NTRBs is applied to representative Aboriginal and Torres Strait Islander bodies which are recognised under section 203AD of the *Native Title Act 1993* (NTA), as well as alternative service providers which receive funds to perform NTRB functions under subsection 203FE(1) of the NTA (NSW Native Title Services, Native Title Services Victoria, and Queensland South Native Title Services).

<sup>2</sup> Once the details of a Prescribed Body Corporate are entered on the National Native Title Register, the body then has the status of a “Registered Native Title Body Corporate”. For ease of reference, this report uses the term PBC to cover both Prescribed Bodies Corporate and Registered Native Title Bodies Corporate.

through which the communal character of native title may be recognised by means of a clearly identified entity that can act for the native title holding group. The primary roles of PBCs are to:

- protect and manage determined native title in accordance with the wishes of the broader native title holding group, and
- ensure certainty for governments and other parties with an interest in accessing or regulating native title lands and waters by providing a legal entity through which to conduct business with the native title holders.

2.2 Available evidence suggests very few PBCs are operating effectively, if at all, in fulfilling these roles. Of the 42 PBCs which have been established to date, most are not complying with all of the requirements of the legislation they are required to incorporate under, and there has been increasing criticism from stakeholders about their workability. PBCs need to operate effectively so that native title holders are able to utilise their native title rights to derive economic and other significant benefits, and to discharge their land management obligations.

*Current and anticipated number of PBCs*

2.3 Any reforms to the existing arrangements for PBCs will need to take into account the number of PBCs which are likely to be established in the foreseeable future. As at 19 May 2006 there were 42 PBCs and 58 determinations that native title exists.<sup>3</sup> The locations of PBCs determined to date, as well as those yet to be established in relation to a determination that native title exists, are set out in the following table<sup>4</sup>:

*Table 1: PBCs determined and yet to be determined as at 19 May 2006*

<b>Jurisdiction</b>	<b>Existing PBC</b>	<b>PBC yet to be determined</b>
Torres Strait	20	0
Queensland	7	1
Western Australia	11	2
Northern Territory	2	5
South Australia	0	1
Victoria	1	0
New South Wales	1	0
<b>Total</b>	<b>42</b>	<b>9</b>

2.4 Although there are currently 574 native title claims, it is unlikely that there will be anywhere near that number of PBCs established in future. A significant proportion of those claims would have been lodged primarily to attract the procedural rights afforded to registered native title claimants under the NTA, and it is possible that some of these claimants may not intend to seek a native title determination. Many of the claims are overlapping and are likely to be consolidated. It

<sup>3</sup> In part, the discrepancy between the number of determinations and PBCs relates to the practice of the Federal Court to allow a delay (in one case of over a year to date) between a determination native title exists and determining the PBC that is to manage the native title. At times the Federal Court has also determined two PBCs for a single determination area, enabling each PBC to manage the rights of a particular sub-group. It is also possible for the Court to determine single PBCs to manage native title for multiple determinations in cases where the native title holders for each determination are the same.

<sup>4</sup> Based on statistics provided by the NNTT.

is also clear that a large number of claims are unlikely to result in a finding of native title.<sup>5</sup> Of the 83 native title determinations made as at 19 May 2006, 25 are to the effect that no native title exists in the claim area. Further, over the last 5 years the number of new claims lodged has slowed significantly - 129 claims were made in 2001 contrasting with only 35 claims in 2005.

2.5 Based on this, it is possible that no more than approximately 100 PBCs will be established in total, although this estimate is subject to the possible determination of multiple PBCs over a single area. It is also likely that, once the stronger claims have been dealt with, some residual cases will see determinations of PBCs with solely non-exclusive rights over land to which another entity – Government or private – holds title and/or management responsibilities. The estimate would also be affected if there was to be a move away from the current trend to the consolidation of claims once residual claims are determined, although it would appear there is less likelihood of determinations in such cases.

### 3. Approach to the report

3.1 The examination was progressed by a Steering Committee, which was chaired by the Attorney-General's Department (AGD) given its responsibility for the native title system as a whole and the Prime Minister's request that the Attorney-General consider how to improve the effectiveness of PBCs. The Steering Committee also comprised the Office of Indigenous Policy Coordination (OIPC), which has formal responsibility for parts of the NTA relevant to PBCs, and the Office of the Registrar of Aboriginal Corporations (ORAC), which has extensive experience with Indigenous governance issues and is responsible for the *Aboriginal Councils and Associations Act 1976* (ACA Act), under which PBCs must incorporate.

3.2 Targeted consultations were undertaken between November 2005 and January 2006. In recognition of the differing needs and cultural backgrounds of stakeholders, the consultations were undertaken in a range of formats, primarily through personal meetings and through the distribution of issues papers seeking comment on particular issues from stakeholders. Stakeholders who were consulted included representatives from a number of PBCs, NTRBs, State and Territory Governments, and industry bodies.

3.3 Information was also drawn from a number of public sources, including submissions made to the recent inquiry by the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Account (PJC) into NTRBs, and to the continuing inquiry by the Senate Legal and Constitutional Legislation Committee into the Corporations (Aboriginal and Torres Strait Islander) Bill 2005 (CATSI Bill).<sup>6</sup> The Steering Committee also had regard to relevant published material on PBCs, primarily produced by legal and anthropological practitioners in the native title system.

3.4 This report analyses the key issues identified through the consultation process, and recommends a range of measures for consideration by Government. These issues have been the subject of detailed consideration by the Steering Committee.

3.5 Further details of the consultations are included at **Appendix 1**.

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<sup>5</sup> The report of the Claims Resolution Review notes that as at 17 January 2006, there had been 1683 native title applications filed in total, but that 1062 had been resolved, discontinued, withdrawn or combined. [Native Title Claims Resolution Review, 31 March 2006, paragraph 4.9.] The Review stated that “[b]y now it is likely that most land (and water) that can be claimed has been claimed” [paragraph 4.17].

<sup>6</sup> It is expected that the CATSI Bill will replace the ACA Act as the incorporation vehicle for PBCs.

## 4. PBC functions and obligations

### *Introduction*

4.1 PBCs are currently governed by a complex legislative framework, which includes a series of functions and powers prescribed by the NTA and the Native Title (Prescribed Bodies Corporate) Regulations 1999 (PBC Regulations), as well as a number of corporate governance requirements imposed under the *Aboriginal Councils and Associations Act 1976* (ACA Act). The following paragraphs summarise the key elements of the existing framework.

### *Requirement that a PBC be established*

4.2 Under the NTA, if the Federal Court determines that native title exists, the native title holders are required to establish a PBC to manage their native title rights and interests. The PBC Regulations provide that all members of the PBC must be native title holders. However, not all native title holders must be members of the PBC. At the time of the determination, the native title holders must<sup>7</sup> nominate a PBC to the Court and indicate whether it will hold their native title on trust (trust PBC), or whether the native title will be held by the native title holders, in which case the PBC will act as their agent and operate on their instructions (agent PBC). The choice between trust and agent PBC will result in different legal relationships between the PBC and the broader native title holding group. For example, in the case of an agent PBC, the broader native title holding group will be liable for any debts that may exist if the PBC becomes insolvent.

### *Native title functions*

4.3 The NTA and the PBC Regulations set out the functions to be carried out by a PBC in managing and holding native title. The functions set out in the NTA include the following:

- receiving future act notices, as well as possibly advising native title holders about, or providing them a copy of, such notices<sup>8</sup>
- exercising procedural rights afforded to native title holders under the NTA,<sup>9</sup> including commenting on, objecting to and negotiating about proposed future acts
- preparing submissions to the NNTT or other arbitral bodies about right to negotiate matters, including whether negotiations have occurred in good faith and objecting to the application of the expedited procedure<sup>10</sup>

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<sup>7</sup> The Federal Court has however adopted a practice of “springing orders” where no PBC is nominated, such that the determination is expressed as being subject to the nomination of a PBC within a specified time period (usually 6 months) and is only actually made if the PBC is nominated. This issue is examined further at paragraphs 8.25-8.31 of this report.

<sup>8</sup> The NTA establishes a procedural framework, known as the future act regime, within which future activity impacting on native title may be undertaken. The regime seeks to ensure that native title rights are taken into account by laying down procedures which must be complied with before acts affecting native title may be done.

<sup>9</sup> Procedural rights may also arise under an alternative state or territory right to negotiate regime. The NTA allows States and Territories to develop their own native title regimes that apply instead of the right to negotiate under the NTA, where the Commonwealth Minister determines that the regime complies with criteria set out in the NTA.

<sup>10</sup> Under the NTA native title holders have the right to negotiate about the doing of certain acts. The NTA also allows for an expedited procedure to apply in relation to acts which would otherwise be subject to the right to negotiate, if those acts are unlikely to interfere directly with the activities of, or sites or areas of significance to, the native title holders. Native title parties have four months to object to the application of the expedited procedure.

- negotiating, implementing and monitoring native title agreements
- considering compensation matters and bringing native title compensation applications in the Federal Court, and
- bringing revised or further native title determination applications cases in the Federal Court.

4.4 The functions set out in the PBC Regulations include the following:

- managing the native title holders' native title rights and interests
- holding money (including payments received as compensation or otherwise related to the native title rights and interests) in trust
- investing or otherwise applying money held in trust as directed by the native title holders
- consulting with the native title holders about decisions that would affect native title and preparing and maintaining documentation as evidence of consultation and consent
- consulting and considering the views of the relevant NTRB for an area about a proposed native title decision, and
- performing any other function relating to the native title rights and interests as directed by the native title holders.

#### *Corporate governance obligations*

4.5 The PBC Regulations provide that PBCs must be incorporated under the ACA Act. The corporate governance requirements that PBCs are required to meet under the ACA Act include:

- conducting and managing meetings of the Governing Committee of the PBC
- conducting annual general and special meetings of PBC members, including elections and nominations for the Governing Committee
- maintaining a register of members to be given to the Registrar of Aboriginal Corporations within six months of the end of each financial year
- keeping accounts and records of the transactions and affairs of the PBC by the Governing Committee, and
- preparing annual committee and examiner's reports at the end of each financial year, which are to be filed with the Registrar.

4.6 As noted below (paragraphs 7.20 to 7.23), the corporate governance obligations imposed on PBCs would be modified significantly under the CATSI Bill, which is currently before the Parliament.

#### *Native title related functions*

4.7 PBCs may also have other functions or obligations under Australian and State or Territory government legislation by virtue of their roles in managing rights and interests in relation to lands

and waters. These will vary according to requirements of the legislation in the relevant jurisdiction, and the nature of the native title rights held. Those PBCs which manage exclusive native title rights are most likely to be subject to a series of land management obligations, which may include:

- controlling and/or destroying feral pests and weeds
- maintaining watercourses or lakes within or adjoining the relevant land
- establishing and maintaining firebreaks, and
- clearing and removing rubbish or refuse.

4.8 PBCs may also have cultural heritage functions to perform. Such functions may arise under the NTA in considering future act notices,<sup>11</sup> as well as under relevant State and Territory legislation and procedures governing heritage issues.<sup>12</sup>

#### *Community expectations*

4.9 A number of stakeholders observed that, following formal recognition of traditional owner status through a native title determination, expectations may be placed on PBCs to fulfil broader roles with respect to indigenous issues, and PBCs may be asked to become involved in activities such as town-planning, social harmony projects, cultural protocols, welcomes to country and interpretive and cultural signage. For example, the Lhere Artepe PBC in Alice Springs is currently promoting measures to address anti-social behaviour by visitors to Alice Springs through strategies such as the development of Visitors Protocols, aimed at educating and providing guidelines for all visitors to Alice Springs. The Mer PBC in the Torres Strait also indicated a strong interest in progressing economic development opportunities within the community.

4.10 While meeting such expectations may go beyond native title functions under the NTA or PBC Regulations, these are often regarded by native title holders and other members of the community as a responsibility which comes with being traditional owners in respect of an area. Although such expectations may be regarded as being of secondary importance in the context of considering measures to improve the effectiveness of PBCs in performing their primary roles (as summarised in paragraph 2.1), the existence of such expectations is clearly relevant to the manner in which PBCs will perform those roles.

## **5. Existing sources of assistance**

### *Introduction*

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<sup>11</sup> For an act to attract the expedited procedure under the NTA (see footnote 10, above), it must not be likely to interfere with areas or sites of particular significance to the native title holders. When considering a future act notice claiming to attract the expedited procedure, the PBC may need therefore need to consider cultural heritage issues relevant to the area over which the proposed act would relate.

<sup>12</sup> For example, the Western Australian Government has implemented regional standard heritage agreements aimed at reducing objections to the expedited procedure. The Government will only seek to attract the expedited procedure for exploration and prospecting licences if the licence applicants have signed one of these agreements. PBCs would be involved in negotiations for such agreements in cases where the licence applies to land managed by the PBC. Under Queensland heritage protection legislation, proponents must develop an approved cultural heritage management plan to undertake any high impact projects. The regime requires proponents to notify any relevant 'Aboriginal party' of proposed activities and to negotiate with them on the development of the plan. PBCs are included in the definition of 'Aboriginal party' under the legislation.

5.1 There is currently no dedicated Australian Government funding to support the ongoing activities of PBCs and it became clear during consultations that assistance from other sources is generally only provided on an *ad hoc* basis. The Australian Government has taken the view that it is not solely responsible for funding of 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.

#### *Assistance from Native Title Representative Bodies*

5.2 The primary form of Australian Government assistance available to PBCs is provided through NTRBs, which receive funding to represent persons who hold or may hold native title within a designated area. Paragraph 203BB(1)(a) of the NTA provides that the functions of an NTRB include assisting PBCs in consultations, mediations, negotiations and proceedings relating to the following:

- (i) native title applications
- (ii) future acts
- (iii) indigenous land use agreements or other agreements in relation to native title
- (iv) rights of access conferred under the NTA or otherwise, and
- (v) any other matters relating to native title or to the operation of the NTA.

5.3 The provision of funding assistance to NTRBs is governed administratively by the General Terms and Conditions Relating to Native Title Program Funding Agreements. Those terms and conditions make clear that NTRBs are generally *not* able to use funding to support or contribute to the operating costs of PBCs or to assist such bodies to meet their regulatory compliance obligations. However, NTRBs *are* able to use the funding to:

- (i) assist with the establishment, incorporation and registration of PBCs up to and including the holding of the first annual general meeting of such bodies, *and*
- (ii) perform the functions of NTRBs (see paragraph 5.2, above) in respect of PBCs *at any time*.

5.4 The latter point is significant in terms of current perceptions regarding Australian Government support for PBCs. A number of stakeholders, including some NTRBs, have suggested NTRBs must cease all involvement with a PBC following its first annual general meeting. An industry representative group suggested in consultations that claimants were reluctant to finalise claims as this would mean that they would be severed from the NTRB and its resources. Similarly, the report of the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Account on its inquiry into NTRBs stated that:

A major problem highlighted during the inquiry was the lack of adequate resourcing of PBCs by the Commonwealth. At present, funding provided by the Commonwealth to NTRBs can

only be used in the initial establishment of PBCs. NTRBs must cease being involved with PBCs when PBCs hold their first annual General Meeting.<sup>13</sup>

5.5 The fact that NTRBs may continue to perform their NTRB functions in respect of PBCs following the first annual general meeting means that NTRBs may continue to assist PBCs at meetings for which PBCs may consult with and obtain the consent of native title holders with respect to proposed future acts, and to provide legal and related advice in relation to such acts.

5.6 OIPC has written to the Chief Executives of all NTRBs in order to make this position clear. Given the extent of concerns among other stakeholders about PBC funding, the Steering Committee considers it would be appropriate for the Australian Government to convey the position more broadly, particularly in the context of any future announcements about PBC reforms.

#### **Recommendation 1**

5.7 The Australian Government should make clear to all stakeholders the extent to which NTRBs may currently assist PBCs following their establishment and incorporation.

5.8 As part of OIPC's performance enhancement program, OIPC arranges training courses for NTRB staff in Corporate Governance and Administrative Law and in Contract Management. PBC members may attend these courses where numbers allow.<sup>14</sup>

#### *Assistance from the National Native Title Tribunal (NNTT)*

5.9 The primary role of the NNTT is to provide assistance to people in resolving native title issues through mediation and assistance in agreement making. The NNTT has provided specific forms of assistance to PBCs in performing their statutory functions. This has included the development of information packages outlining and explaining the statutory functions of the PBC, as well as training for PBC members. One NTRB commented in consultations that "the NNTT provides an excellent training module and associated literature in relation to the general roles and responsibilities of PBCs."

#### *Office of the Registrar of Aboriginal Corporations*

5.10 ORAC's role is to assist the Registrar of Aboriginal Corporations in administering the ACA Act and to deliver incorporation, regulation and related services for Aboriginal and Torres Strait Islander people in a manner consistent with the special needs, requirements and risks of Indigenous corporations and within the context of current and emerging law and practice on good corporate governance. ORAC is currently able to provide the following forms of assistance to PBCs:

- assistance with corporate design and developing of the constitution pre-incorporation
- re-design and rule changes post-incorporation
- information sessions on good corporate governance, and
- accredited and non accredited training in Governance.<sup>15</sup>

<sup>13</sup> 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, paragraph 5.65 [footnote omitted].

<sup>14</sup> The relevant training courses are each of 1.5 days duration.

<sup>15</sup> These comprise an introductory workshop in governance (3 days), and a course for the Certificate IV in Business (Indigenous Governance).

5.11 NTRBs which had utilised ORAC's governance training and support, or organised it for PBCs, indicated high levels of satisfaction. Some stakeholders considered more specific and ongoing training, tailored to the circumstances and needs of individual PBCs would be useful.

#### *Indigenous Land Corporation (ILC)*

5.12 The ILC is established by Commonwealth statute to assist Indigenous Australians to acquire and manage land. Its land management program is directed at assisting in activities which provide sustainable cultural, social, environmental or economic benefits, through the managed use, care or improvement of indigenous-held land. The ILC advised that it can assist PBCs with capacity development, property management plans and business plans to develop good corporate management practices. Such assistance may be provided in conjunction with services offered by ORAC.

5.13 As a matter of policy, the ILC does not provide recurrent funding, and has a threshold requirement that corporations they assist have a basic level of sustainability. At present, it is probable only a few PBCs could meet this requirement and we understand that to date the ILC has offered assistance to a small number of PBCs.

#### *Indigenous Business Australia (IBA)*

5.14 The IBA is established by Commonwealth statute to promote business participation among Indigenous people. Its roles include administering the Indigenous Business Development Programme (IBDP), which aims to facilitate the establishment of commercially viable enterprises among Indigenous people through the provision of business support services, business finance, and funding economic development initiatives.

5.15 The main criteria for IBA investment in a given project are the financial viability of the project and the benefits to the local Indigenous community from employment, training and income. As such, it is again probable that few if any existing PBCs would currently be eligible for such support. IBA does not simply fund such projects, but enters into joint venture agreements with private sector interests and appropriate community organisations in various ways. It is not permitted to provide grant funding but may provide loans to an Indigenous body or assist that body to identify alternative sources of finance.

#### *Office of Indigenous Policy Coordination*

5.16 OIPC is responsible for coordinating a whole-of-government approach to programs and services for Indigenous Australians. Its roles include:

- coordinating and driving whole-of-government innovative policy development and service delivery across the Australian Government
- brokering relations with State and Territory Governments on Indigenous issues
- communicating government policy directions to Indigenous people and the community generally, and
- developing new ways of engaging directly with Indigenous Australians at the regional and local level, including through Regional Partnership Agreements (RPAs) (where there is local interest) to customise and shape Australian Government interventions in a region and Shared Responsibility Agreements (SRAs) at community/clan/family level.

5.17 SRAs are agreements at the local level between communities, governments and others and set out what each will contribute to achieve long-term changes in Indigenous communities. RPAs are similar to SRAs but are made with a group of communities. RPAs address government investment across a whole region, to promote coordination, eliminate overlaps or gaps, and meet regional needs and priorities.

#### *Australian Government portfolio agencies*

5.18 Information provided by Australian Government departments and agencies indicates there is a diverse range of programs that PBCs may *potentially* access to build capacity, obtain training, develop partnerships or progress specific projects. For example:

- the Department of Communications, Information Technology and the Arts (DCITA) will be launching the Backing Indigenous Ability segment of the Connect Australia Package in July 2006. Under this program PBCs may be able to apply for telecommunications specific funding including broadband and mobile services.
- DCITA also administers an IT Training and Technical Support Program which has been allocated \$10.1m and provides community-based assistance for ‘first time’ computer users located in very remote areas of Australia.
- the Department of Employment and Workplace Relations (DEWR) administers the Indigenous Economic Development Strategy, which includes training and support for local Indigenous business entrepreneurs and asset and wealth management initiatives.
- DEWR advises that it also has business development assistance which can assist PBCs with the investigation of any potential business start ups and provide business training.
- The Department of Agriculture, Fisheries and Forestry (DAFF) is developing a National Indigenous Forestry Strategy to identify opportunities for Indigenous people to participate in the growth of Australia’s forest and wood products sector, and to develop a means of support for Indigenous people to participate in these activities.
- the Department of Industry, Tourism and Resources administers a Working in Partnership program which is designed to foster better relationships specifically between the mining industry and Indigenous communities. The program provides support for regional committees to meet on a regular basis in some of the country’s main mining provinces.
- the Natural Heritage Trust, administered jointly by the Department of Environment and Heritage (DEH) and DAFF, which supports environmental and natural resource management investment, has several components that can support Indigenous groups. This includes the Indigenous Protected Areas Program, administered by DEH, under which Indigenous landowners can obtain support to manage their lands for the protection of natural and cultural features.

5.19 We understand the majority of these programs are application based, and as such PBCs may need assistance in applying for them.

### *State and Territory governments*

5.20 State and Territory governments have adopted differing approaches to funding and support for PBCs. For example, the Northern Territory Government provided assistance to the Lhere Artepe PBC in Alice Springs in the form of a one-off establishment grant of \$200,000, and a special purpose grant of \$50,000.<sup>16</sup> The Victorian Government provided funding for the administration and operation of the only PBC established in Victoria (under an agreement established in relation to the determination for the Wotjobaluk, Jadawadjali, Wergaia and Jupagulk Peoples). The funding facilitates compliance with the fulfilment of the PBC's statutory functions. WA has recently indicated that it may be prepared to consider funding for bodies corporate which are established under an alternative settlement framework.

5.21 Like the Australian Government, State and Territory governments also offer a range of land management and other programs which may be suitable for PBCs. However, information about such programs is not widely available and in the course of consultations States and Territories did not provide any specific details about appropriate programs. It is understood that some programs may utilise State or Territory funding while others may combine Australian Government funding with State/Territory on-the-ground assistance.

### *The private sector*

5.22 There is limited information available on possible forms of assistance for PBCs from private sector bodies. A number of private financial institutions operate programs to assist Indigenous people and businesses with financial matters and capital, including support in accessing commercial finance, and access to professional and mentoring support services.<sup>17</sup> The mining industry also provides programs for and support to Indigenous people.<sup>18</sup>

5.23 Funding for PBCs is also potentially available on an *ad hoc* basis through proponents of activities in the context of negotiations for future acts. Such assistance is generally in the form of facilitating a PBC's participation in negotiations, such as through funding attendance at meetings or access to professional services (i.e. legal or anthropological advice), or in the form of compensation negotiated in relation to the act, which the native title holders may apply to operating their PBC. While industry bodies are generally prepared to provide assistance for consultations about acts they will benefit from, many bodies consider that establishment and operating costs should be the responsibility of Government.

### *Conclusion*

5.24 Although there is clearly a broad range of potential sources of assistance for PBCs, it should be noted that the availability of such resources will depend on the particular circumstances of the relevant PBC, and that most would only be available to PBCs which already have established a

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<sup>16</sup> The special purpose grant was to cover office equipment and expenses, and the establishment grant in 2004-05 was for the employment of a co-ordinator and clerk's position for 12 months.

<sup>17</sup> For example, in December 2005 the Macquarie Bank announced its intention to establish a development fund and an on-going investment fund to assist indigenous land owners to utilise their land to achieve financial rewards and a long term sustainable income.

<sup>18</sup> For example, Pilbara Iron has an Aboriginal Training and Liaison unit, which is designed to support self-determination and community capacity building within Aboriginal communities in the Pilbara. The unit runs education programs, pre-employment training programs, and scholarship and cadetship programs and supports Aboriginal people in the development of small business enterprises - in particular, small community businesses that can service the needs of Pilbara Iron operations.

basic level of sustainability. (Options for assistance to establish this level are considered in Part 8 of this report.)

5.25 Nevertheless, it is apparent that of the existing sources of potential funding, very few are currently being accessed by PBCs, and our consultations indicated that NTRBs and PBCs were largely unaware of the forms of assistance which may be available. In particular, there is no readily available means of accessing comprehensive information about how those sources may be applied assist bodies which hold native title.

5.26 Although a number of Australian Government agencies such as OIPC, ORAC and the NNTT have access to information regarding such programs for the purposes of their functions, to date there has been no dedicated effort to collate such information into user-friendly packages directed specifically to native title issues. Such information packages could be tailored to each State and Territory, thereby incorporating relevant programs and resources from all Governments.

5.27 The Steering Committee notes it may be appropriate to commission the development of such information packages from the Native Title Research Unit (NTRU) of the Australian Institute for Aboriginal and Torres Strait Islander Studies (AIATSIS). Currently, the NTRU publishes the Native Title Resource Guide, an on-line resource that acts as a portal site for accessing information about native title. It collates native title and related Indigenous land issues information from a wide range of sources including NTRBs, the NNTT, the ILC, government Departments and the Federal Court. The NTRU receives funding from OIPC to perform its functions in providing independent research and policy advice to promote the recognition and protection of native title. In order to ensure a transparent process, it may be preferable for OIPC to issue a tender for the development and maintenance of such packages.

#### **Recommendation 2**

5.28 The Australian Government should arrange the preparation and maintenance of information packages for PBCs for each jurisdiction, outlining relevant State and Territory legislation, potential sources of assistance through Government grants and programs, as well as available information on support from the private sector.

5.29 One fact which became clear from consultations was that many stakeholders in the native title system have a limited understanding of the functions, needs and responsibilities of PBCs. This may itself affect the ability and readiness of stakeholders to develop appropriate packages of support. In particular, is important to ensure that industry bodies and local government authorities are aware of the critical role which PBCs perform in delivering certainty for dealings and activities on lands and waters over which native title has been determined. Equally, native title holders need to be aware of the fundamental role played by PBCs in relation to the protection of native title, and the appropriate management of their native title rights and interests.

5.30 Although the Australian Government has a clear role to play in promoting a better understanding among stakeholders of PBC functions (including through the NNTT), it is critical that this be done in consultation with State and Territory Governments. This would recognise the important role that State and Territory Governments play in brokering agreements between stakeholders, as well as their particular interests and responsibilities in land management. In particular, consent determination negotiations will generally involve key parties with an ongoing interest in the relevant land and waters, and therefore an interest in the effective functioning of the PBC following the determination (such as governments, native title parties and industry bodies). It is in the interests of all such parties that post-determination links be considered as one aspect of the

matters to be addressed in relation to a proposed consent determination, whether as part of the determination itself, or in an ancillary agreement.

5.31 Adoption of a consultative approach across jurisdictions should be implemented as part of a related element of the native title reform package, namely increased dialogue and consultation with State and Territory Governments to promote and encourage more transparent practices in the resolution of native title issues.

### **Recommendation 3**

5.32 The Attorney-General and the Attorney-General's Department should press State and Territory Governments to agree to:

- place PBC establishment and needs on the agenda for consideration of all parties as a matter of practice when negotiating consent determinations or future act agreements, and
- actively promote a better understanding of the functions, needs and responsibilities of PBCs among other stakeholders in the native title system.

This should be done through multilateral forums, such as the Native Title Ministers' Meeting, as well as through bilateral meetings and consultations at ministerial and officer level.

## **6. Resource needs**

### *Introduction*

6.1 In considering the resource needs of PBCs, two key points became apparent from our consultations. First, it is clear that the level of resources currently available will not meet all of the requirements imposed on PBCs under the current regime. While some of these difficulties can be alleviated through possible reforms to streamline the existing statutory governance model (see Part 7), we consider that there will need to be additional measures taken by Governments to ensure that PBCs may function effectively.

6.2 Second, the basic needs of PBCs will vary considerably according to their circumstances, and cannot be addressed through an approach which assumes one solution will resolve all of these issues. The key theme emerging from consultations and previous studies of PBCs is that a large number of factors will determine the ultimate resource needs of a PBC. These include geographical location (remoteness), the nature and extent of native title rights and interests held, the nature of the relevant group of native title holders (including dispersion), the complexity of the consultation and decision making processes of the native title holders, and the level and type of future acts which may apply to the area.

6.3 It should also be recognised that, while a determination of native title rights may offer economic opportunities, many PBCs are unlikely to have a capacity to be self-funding, even over the longer term. In a number of regions subject to native title determinations, there may be few if any future acts proposed that will affect the determined native title for some years. Not all future acts concern economic activities or can offer economic benefit to a PBC. In other regions, however, the extent of future acts may be intensive. While this may impose greater demands on the PBC, it may also offer further avenues of support to meet such demands.

### *Basic establishment needs*

6.4 As noted in paragraphs 5.2 to 5.5, NTRBs are able to assist PBCs with their establishment, incorporation and registration up to and including the PBC's first annual meeting. It is apparent, however, that some native title holders are experiencing difficulties in establishing a PBC prior to their native title determination being made and, as noted above, on several occasions the Federal Court has allowed a delay between a determination that native title exists and the determination of the PBC. It is unclear whether this is primarily attributable to resource needs, or to other factors such as difficulties in reaching agreement between native title holders on the structure and processes for the PBC.

6.5 A number of stakeholders emphasised the value of seeking to initiate processes for establishment of PBCs early in the context of native title claims. Against this, however, it must be acknowledged that key factors critical to the establishment of a PBC may not be resolved until a late stage in the claims process. This may include the membership of the claimant group and, indeed, the existence of native title rights over the claim area.

6.6 In the first instance, we consider there would be value in ensuring that greater guidance is made available to PBCs in the lead up to a determination, particularly in cases where a 'consent determination' is likely to be made under section 87 of the NTA. The provision of such guidance could be coordinated by ORAC, with the assistance of the NNTT and the relevant NTRB where appropriate. Such guidance should include:

- training in the statutory roles and responsibilities of PBCs, and on governance issues
- information on potential sources of assistance for PBCs
- advice and assistance on decision making processes and record keeping.

#### **Recommendation 4**

6.7 The Office of the Registrar of Aboriginal Corporations should coordinate the provision of relevant information on PBCs to native title claimants in the lead-up to the making of any native title determinations. This should include information and training on roles and responsibilities and related governance issues, and sound decision-making processes and record keeping. Such information could be provided with the assistance of the National Native Title Tribunal and the relevant Native Title Representative Body.

### *Continuing needs and infrastructure*

6.8 As anticipated, stakeholder views on specific continuing resource needs for PBCs varied considerably. However, the following core needs were identified by most stakeholders:

- communications facilities, whether by post, telephone, fax or internet, to enable PBCs to be contacted and to contact others, particularly in respect of proposed future acts
- administrative facilities for the production and copying of documents (including computer facilities, paper and stationary)
- facilities for storage of records relating to PBC functions (the NTA, the PBC Regulations and the ACA Act all include statutory requirements for the maintenance of significant records)

- where required, resources and support for consultations and meetings of PBC members and native title holders (the costs involved may be significant in circumstances where the members are remotely dispersed, and will normally include both travel and arrangements for meeting venues)
- access to professional services and advice (this may include legal and anthropological advice in respect of future acts, financial advice about the implications of proposed agreements, assistance with environmental and surveying matters, advice on taxation and insurance issues, as well as general management skills)
- continuing training in governance and financial management issues, and
- in certain circumstances, assistance for the costs of employing office staff.

6.9 As noted in paragraph 4.7, above, PBCs may also require specific assistance in relation to obligations imposed under Australian and State or Territory government legislation by virtue of their roles in managing rights and interests in relation to lands and waters.

6.10 A range of options to more effectively address the needs outlined above is considered in Part 8 of this report.

## **7. Reforms to the existing statutory governance model**

### *Native title functions*

7.1 The native title functions to be carried out by PBCs are summarised in paragraphs 4.3 and 4.4. Although these functions are generally considered appropriate, it is apparent that the existing model prescribing the way in which such functions are exercised imposes onerous burdens on PBCs. Some of the difficulties outlined below have been identified in previous analyses of this issue by Government agencies.<sup>19</sup>

7.2 A key theme which has emerged through consultations is that the governance models need to be flexible, and that different traditional owner groups in different circumstances will require specific structures to meet their needs and goals. The proposals outlined below are designed to provide more flexibility to the existing governance model, with a view to facilitating greater choice by native title holders in deciding which structures to adopt in light of their specific circumstances.

### *Requirements for consultation and consent on 'native title decisions'*

7.3 Regulation 8 of the PBC regulations currently requires PBCs to consult with, and obtain the consent of, common law holders of native title rights and interests before making a 'native title decision'. This is currently defined to mean 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.

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<sup>19</sup> In particular, a Committee was established in 1999 to review the PBC Regulations. In September 2005 the Committee (comprising OIPC, AGD, ORAC, the NNTT, the Torres Strait Regional Authority, and a consultant anthropologist) was wound up following the Government's decision on the proposed reforms to the native title system. The work of that Committee has informed the present examination of PBCs.

7.4 The effect of paragraph (b) of this definition is presently unclear, and its ambiguity gives rise to particular difficulties. For example, it may mean that a PBC will be making a ‘native title decision’ when simply making comments on a proposed future act.<sup>20</sup> Although we did not identify any consistent approach to this by PBCs, our informal consultations indicated a number of PBCs and NTRBs *assumed* that PBCs are required to engage in the consultation and consent process in relation to all future acts. Moreover, given the resource constraints outlined in Part 6, above, it is clear that aspect of the governance model imposes a very significant burden on some PBCs.

7.5 It should be noted that the requirement to consult on native title decisions is a presumptive one, in so far as native title holders can ‘opt out’ of the requirement through inclusion of an express provision in their rules. However, it is apparent that few PBCs have exercised this option at the time of establishment, which means that the presumption in favour of consultation on *all* acts which may conceivably affect native title automatically applies.

7.6 We consider it would be appropriate to modify the existing requirement so the regulations only require consultation in relation to decisions which involve the *surrender* of native title rights or interests.<sup>21</sup> This would not affect the ability of native title holders to impose additional consultation and consent requirements on their PBC through the PBC’s rules. This would mean that, subject to any decision by the native title holders to ‘opt in’ to more onerous consultation requirements, the automatic requirements under the regime would not apply to other decisions. It would also encourage native title holders to consider their precise circumstances in establishing procedures for consultation under their rules.

#### **Recommendation 5**

7.7 The PBC regime should be amended to make clear that the statutory 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 or waters.

#### *Availability of ‘standing authorisations’*

7.8 Paragraph 9(2)(b) of the PBC regulations envisages a procedure for native title holders to issue ‘standing authorisations’ in relation to decisions affecting native title. In summary, it provides that the holders may be taken to have consented to a proposed native title decision if a document (complying with certain requirements) certifies that:

- (i) the proposed decision is of a kind about which the holders have been consulted; and
- (ii) the holders have decided that decisions of that kind can be made by the PBC.

7.9 It is apparent, however, that this procedure is almost never adopted in practice. Although this may reflect, in part, a concern on the part of native title holders against delegating authority, the existing provisions are complicated and very difficult to implement in practice. We consider they could be streamlined considerably.

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<sup>20</sup> If the word ‘affect’ in paragraph (b) of the definition has the meaning given in section 227 of the NTA, it is unlikely that these processes could be said to affect the holders’ native title rights and interests. Section 227 of the NTA provides that 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.

<sup>21</sup> Such decisions would apply to acts involving the extinguishment of native title rights.

7.10 The existing process contemplates that a certificate, signed by five members of the PBC who are affected holders of native title, be provided in connection with *each* decision which is the subject of a standing authorisation.<sup>22</sup> This undermines the efficiency of the process, in so far as PBCs may encounter difficulties in obtaining the signature of such persons within a reasonable time.

7.11 It would be appropriate to amend this requirement so that only one certificate needs to be signed in connection with each standing authorisation issued by the PBC. The certificate should certify that the holders have been consulted about how certain kinds of decisions are made, and specify the content of decisions which have been authorised (including any conditions or circumstances attached to the authorisation). In summary, this would ensure that certificates which evidence standing authorisations need only be prepared once, at the time the authorisation is provided, rather than each time a PBC makes a decision in accordance with the authorisation.<sup>23</sup>

#### **Recommendation 6**

7.12 The PBC regulations should be amended to clarify the circumstances in which ‘standing authorisations’ may be issued to a PBC, and, in particular, to provide that only one certificate needs to be issued with each authorisation.

#### *Enabling existing PBCs to assume functions for subsequent determinations*

7.13 The PBC regulations currently limit the possibility of an existing PBC being determined in respect of a subsequent determination of native title, even where the native title holders may agree to this.<sup>24</sup> The only circumstances when this may be done are where all members of the existing PBC are also native title holders in relation to the subsequent determination.<sup>25</sup>

7.14 Allowing an existing PBC to be determined as a PBC for subsequent determinations of native title may encourage economies of scale by allowing PBC infrastructure and resources to be utilised by more than one group of native title holders where both groups wish to be represented by the same body corporate. It could also enable more coordinated management of native title across given regions.

7.15 Assuming this is adopted, it would be necessary to include criteria in the regulations governing the appointment of existing PBCs. In particular, it would be necessary to include provisions ensuring the native title holders for the existing PBC as well as those nominating the PBC to represent their rights consent to the proposal. Given the different functions performed by trust and agent PBCs,<sup>26</sup> it would be appropriate to ensure that this distinction is observed when an existing PBC assumes responsibility over land covered in a subsequent determination.

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<sup>22</sup> Regulation 9(2)(b)(i) appears to require relevant members of the PBC to certify that a particular decision in fact falls within standing instructions issued by the common law holders.

<sup>23</sup> In the interests of clarity, the regulations should also make clear that a standing authorisation may be issued where the native title holders have a traditional decision making process.

<sup>24</sup> This is because regulation 4(2)(a) of the PBC regulations requires all members of a PBC to be persons who, at the time of making a determination, are included or proposed to be included as native title holders. This is also discussed in relation to recommendation 6.

<sup>25</sup> For example, the Karajarri People’s claim was the subject of two separate determinations, in 2002 and 2004, although one PBC manages the native title for both determinations, as the claimant group was identical. See *Nangkiriny v State of Western Australia* [2004] FCA 1156.

<sup>26</sup> See sections 56 and 57 of the NTA, and regulations 6 and 7 of the PBC regulations.

**Recommendation 7**

7.16 The PBC regime should be amended 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 to this.

*Broader membership options – non-native title holders as PBC members*

7.17 A further means of providing more flexibility to the existing governance model would be to enable native title groups to include other persons in their corporate structure, including non-traditional owner Indigenous people and non-Indigenous people. This could assist in making the structure more representative of the broader community in which they live, and to increase the corporation's skill base. Although some persons consulted questioned the appropriateness of having non-native title holders perform native title functions, we consider it should be open to the native title holders to avail themselves of additional skills and representation as part of their corporate structure if they consider this appropriate. In order to ensure the ongoing protection of native title, the PBC would still be required to undertake consultation and consent with native title holders in accordance with the existing regime, as modified under recommendations 5 and 6, above.

**Recommendation 8**

7.18 The PBC regulations should be amended 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.

*Corporate governance obligations*

7.19 The existing corporate governance obligations are summarised in paragraph 4.5. Many stakeholders raised concerns about the appropriateness of these obligations, noting that in some cases a PBC may have little or no future acts to deal with, no significant income, limited other functions, and will therefore have little to report on or discuss.

7.20 The CATSI Bill will significantly alleviate the existing burdens imposed on PBCs under the ACA Act. In particular:

- Reporting requirements will be calibrated in accordance with the size of the relevant corporation. Most PBCs would currently fall within the category of 'small' corporations. Under the Bill, small corporations will only be required to provide a minimum 'general' report, and may only have to provide this every second year.
- Small corporations may also only be required to hold an annual general meeting every second year, and can hold these by video or teleconference.
- Native title rights and interests held by a PBC will *not* be included in determining the value of the PBC's assets for reporting purposes.<sup>27</sup>
- The Bill provides further flexibility in so far as the Registrar may exempt specified classes of corporations from some or all of the record-keeping or reporting requirements.

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<sup>27</sup> This avoids the possibility that a PBC which only holds or manages native title rights and interests may be determined as being a 'large' corporation for reporting purposes.

- The Bill makes clear that a director, officer or employee of a PBC who is acting in good faith to ensure the PBC complies with obligations under native title legislation does not breach provisions of the Bill.<sup>28</sup>
- The Bill provides that the internal governance rules for PBCs must be consistent with native title legislation. This will ensure the rules of a PBC do not conflict with requirements imposed by such legislation.
- The Bill will enable the making of regulations to clarify the powers and obligations of administrators, receivers, liquidators and special administrators who are appointed to a PBC. This will assist in resolving any practical issues which may arise in the interaction between the external administration provisions of the Bill and native title legislation.

7.21 The CATSI Bill is currently being examined by the House of Representatives Standing Committee on Legal and Constitutional Affairs. Assuming the Bill is passed by Parliament, it is anticipated that it will come into effect from July 2007.

7.22 We consider that the elements proposed in the CATSI Bill, would, if implemented, considerably alleviate the existing corporate governance requirements imposed on PBCs under the ACA Act. The key issue which emerged from our consultations related to the complexity of the proposed new regime, as well as the impact it may have on existing PBCs which will need to comply with the regime under transitional arrangements.

7.23 Some stakeholders suggested that, given the unique and complex nature of PBCs, it would be appropriate to address all PBC requirements in a separate part of the CATSI Bill. However, this would add further complexity to the overall Bill, which is designed to cover more than 2500 different Aboriginal and Torres Strait Islander corporations already registered under the ACA Act. Moreover, it is unlikely that the provision of a separate regime in itself would significantly simplify matters for those persons subject to the legislative requirements. It would be more appropriate to ensure that appropriate guidance and training be provided to PBCs (and related stakeholders) to enable them to operate more flexibly and effectively under the new legislation.

#### **Recommendation 9**

7.24 The Office of the Registrar of Aboriginal Corporations should develop and distribute appropriate educative material regarding obligations and requirements under the CATSI legislation to all PBCs and NTRBs. This should include:

- (a) a Guide to Good Governance specifically tailored to PBCs
- (b) model rules for PBCs, and
- (c) additional information as appropriate.

<sup>28</sup> An exception to this is the duty not to trade while insolvent. If a conflict arises between the duty in the Bill not to trade while insolvent and duties under native title legislation, the primary duty is to make sure the PBC does not trade while insolvent.

## 8. Options to meet PBC resource needs

### *Introduction*

8.1 The overwhelming majority of submissions received indicated there was a clear need for additional resources to be provided to support PBCs, and most of those considered the Australian Government should provide this. Although the Steering Committee considers that there is scope for further assistance to be provided to PBCs by the Australian Government in particular circumstances, it is also necessary to consider complementary measures to ensure better use is made of resources which are currently available within the native title system.

### *Ensuring NTRBs provide appropriate assistance to PBCs in relation to native title functions*

8.2 As noted in paragraphs 5.2 to 5.5, NTRBs are currently permitted to provide PBCs with considerable assistance with respect to matters relating to native title or the operation of the NTA. In theory, this should include assistance in consultations, mediations, negotiations and proceedings relating to future acts, ILUAs and other native title agreements, rights of access, and other matters relating to native title or the operation of the NTA. However, the extent to which NTRBs provide such assistance in practice is presently unclear, and anecdotal evidence indicates that some NTRBs give greater priority to progressing claims awaiting determination.

8.3 Given the evident difficulties which PBCs (and stakeholders) are currently experiencing in dealing with future act and related issues, and the fact PBCs will assume progressively greater significance in the native title system as more determinations are made, the Government should implement measures to ensure NTRB assistance to PBCs is given appropriate priority, and that the level of such assistance is more transparent. This should not involve alterations to the *general* terms and conditions for NTRB funding, since PBCs have only been established in certain NTRB areas. It would be more appropriate for OIPC to require this to be addressed in NTRB operational plans and budget submissions. NTRBs should be required to detail the nature and level of support which they expect to provide to PBCs, and to report on the implementation of such measures as part of their general reporting requirements.<sup>29</sup> In considering proposed NTRB budget allocations, OIPC should give appropriate priority to functions associated with PBCs.

### **Recommendation 10**

8.4 The process for allocating funds to NTRBs should be modified to ensure that appropriate priority is given to the performance of NTRB functions associated with assistance to PBCs. NTRBs should be required to detail the nature and level of support which they expect to provide to PBCs, and to report on the implementation of such measures.

### *Enabling PBCs to recover costs from other parties*

8.5 The above proposal would improve the alignment between existing Australian Government funding and the operational resource demands involved in performance of PBC functions under the NTA. This should be complemented by clarifying the basis for PBC funding from other sources, namely proponents of future acts, particularly in circumstances where there is a high degree of future act activity in relation to the area.

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<sup>29</sup> Note that NTRB reforms comprise a separate element of the native title reform package, and that the specific reporting requirements imposed on NTRBs are likely to be changed as part of those reforms. The measures proposed above could be implemented within the proposed new framework.

8.6 There have been some instances in which future act proponents (generally mining interests, and occasionally State or Territory Governments) have been prepared to provide financial assistance to PBCs in order to expedite the consultation and consent processes involved in securing agreement for the future act. Such assistance may be given directly to the PBC, or be provided through the relevant NTRB for the area.

8.7 As outlined above, it would normally be expected that NTRBs may provide the relevant assistance. However, there will be circumstances in which due to competing demands on NTRBs, it will not be possible for them to fulfil this role within the timeframes required by future act proponents. It would be appropriate to meet such circumstances by providing a clear legal basis through which PBCs may recover costs incurred in performing their functions at the request of future act proponents, in cases where NTRB assistance is not available. The costs recovered should be strictly limited to those involved in performing the specific functions sought (such as transport and convening of meetings), and should not be directed at recovery of establishment costs or continuing administrative costs for PBCs.

8.8 Under the existing legislative regime, PBCs are not able to seek reimbursement from or charge third parties for costs 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.<sup>30</sup> While this 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.

8.9 If this proposal was implemented it would be necessary to include safeguards to ensure that smaller proponents of future acts are not disadvantaged through a distortion in PBC activity towards those projects for which third party funding is available. This may be met in part through the accountability mechanism for NTRB assistance outlined above. The legislation should make clear the authority to recover costs is limited to those reasonably incurred by or on behalf of the PBC in performing the relevant functions. It should also provide for an appropriate authority to investigate such arrangements on request.<sup>31</sup>

#### **Recommendation 11**

8.10 The Native Title Act should be amended to 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. The amendments should also provide for an appropriate authority to investigate such arrangements on request, to ensure the costs were reasonably incurred.

#### *Assistance with general operations and administration through provision of common services*

8.11 Recommendations 10 and 11 will assist in enabling PBCs to perform their statutory functions with respect to native title. However, these recommendations still assume the existence of a functioning corporate body with access to the resources identified in Part 6 of this report, and able to meet their obligations under the relevant corporate regime.

<sup>30</sup> See, for example, *Attorney-General v Wilts United Dairies* (1922) 91 LJKB 897 at 900, *McCarthy & Stone (Developments) Ltd v London Borough of Richmond Upon Thames* (1991) 3 ALR 941.

<sup>31</sup> The agencies represented on the Steering Committee would develop a specific proposal in this regard.

8.12 Some stakeholders, including a number of PBCs, have suggested that the Australian Government should provide each PBC with sufficient resources to establish, maintain and support its own organisational structure, so it may deal with management of native rights and interests as a completely independent stand-alone body. Such an approach would, however, be very expensive to maintain and probably impossible to implement effectively in practice. In particular, the human resource component assumes the availability of a large number of persons with specialist knowledge in anthropology, native title law and geospatial mapping. The pool of expertise in regional areas is limited, and if PBCs were to compete for professional services this would exacerbate the shortage and increase costs.

8.13 With respect to physical resources, such as office accommodation, communication and transport facilities, it should be recognised that the demand for these will vary according to the PBC. For many PBCs, the use of such resources will be minimal, although the need may arise on an ad hoc basis.

8.14 Accordingly, to the extent that assistance with general operations and administration is to be provided, it would be preferable for this to be done through provision of common services and facilities, on a regional and/or national basis, where practicable.

8.15 A significant number of stakeholders supported the provision of such assistance through existing NTRBs.<sup>32</sup> In general terms, it was noted that NTRBs are already authorised to assist PBCs with respect to their native title functions, and utilising NTRBs to assist with corporate responsibilities (such as arrangements for annual meetings, handling of correspondence, communications with members), could avoid duplication. NTRBs have generally established relationships with the native title holders (including through assistance in securing a determination of native title, and in initially establishing the PBC), and NTRBs have relevant staff, expertise and facilities to provide such assistance.

8.16 While this may be appropriate in some circumstances, we do not consider the provision of assistance should *necessarily* be made through NTRBs in every case. There may be instances where the native title holders are not prepared to work with the relevant NTRB, or where the other demands and priorities of the NTRB preclude the availability of direct assistance to the PBC. There may, moreover, be other avenues of assistance in relation to specific cases, such as Indigenous Coordination Centres. The implementation of a regime for providing common services for PBCs should be flexible enough to address the specific circumstances of individual PBCs.

#### **Recommendation 12**

8.17 The General Terms and Conditions Relating to Native Title Program Funding Agreements should be amended to enable NTRBs to assist PBCs with their day to day operations in circumstances where this has been approved by the Office of Indigenous Policy Coordination.

#### *Shared Responsibility Agreements*

8.18 As outlined in paragraphs 5.20 to 5.21, State and Territory Governments have occasionally been prepared to provide direct assistance for PBCs, although most consider that this should be the

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<sup>32</sup> This included most of the NTRBs which offered comment on this issue, as well as three of the State and Territory governments, and the NNTT.

responsibility of the Australian Government. It is clear that this issue should be addressed by *all* Governments in a more coordinated and comprehensive manner.<sup>33</sup>

8.19 This could be most appropriately progressed through the development of Shared Responsibility Agreements (SRAs) and/or Regional Partnership Agreements,<sup>34</sup> which form a key element of the broader Council of Australian Governments' framework of working in partnership with Indigenous communities. SRAs are intended for Governments and communities to establish partnerships and share responsibility for achieving measurable and sustainable improvements for persons living within the community, and to support and strengthen local governance, decision-making and accountability. Measures to promote the effective functioning of PBCs in respect of land over which native title has been determined would be a logical application of the existing SRA program. Assistance could include establishment grants, infrastructure support, capacity building or funding employment for PBC staff.

### **Recommendation 13**

8.20 The Australian Government should, in consultation with State and Territory Governments, actively promote measures for providing support to PBCs via Shared Responsibility Agreements and/or Regional Partnership Agreements.

#### *State and Territory land rights corporations*

8.21 A number of stakeholders raised concerns about the overlapping of responsibilities and rights between native title holders under the NTA and bodies performing functions under State or Territory land rights legislation. It has been suggested that the current situation, whereby PBCs and land rights corporations operate independently of each other in respect of the same area can lead to duplication of administration, wasted resources and organisational rivalry.

8.22 The introduction of changes to enable such corporations to perform PBC functions gives rise to a large number of complex legal and policy issues. In particular, it would be necessary in the first instance for States and Territories to amend the legislation by or under which the relevant bodies are established to ensure that their statutory functions and powers may include acting as a PBC. It would also be necessary to introduce changes to the rules and articles of association of such bodies. It is also unclear as to whether native title holders would be prepared to have their rights managed by land rights corporations which were initially established for other purposes. In some situations (e.g., where the land rights corporation also performs NTRB functions), there may be a conflict of interest precluding such an arrangement.

8.23 In light of these difficulties, we do not recommend the introduction of such changes at this particular time. We do, however, consider that the issue should be further examined in consultation with State and Territory Governments.

### **Recommendation 14**

8.24 The Australian Government should 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.

<sup>33</sup> The communiqué issued following the Native Title Ministers' meeting on 16 September 2005 expressly acknowledged 'the importance of ensuring that Prescribed Bodies Corporate can effectively hold native title on behalf of claimants'.

<sup>34</sup> See discussion at paragraph 5.16 above.

### *'Default' PBCs*

8.25 Paragraph 57(2)(a) of the NTA provides that if the native title holders do not nominate a PBC, the Court must determine which body corporate is to perform the functions of the PBC in accordance with the regulations. In effect, this contemplates a regime whereby 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.

8.26 There are currently no regulations prescribing a default body or how it would operate. On several occasions 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 before a PBC has been established. This has resulted in considerable uncertainty for third parties in relation to dealings concerning the relevant land.

8.27 Although recourse to a default PBC should be avoided in practice wherever possible, it would be desirable to develop a mechanism for the performance of PBC functions by such a body in strictly limited circumstances, namely:

- (a) if the native title holders have been unable to agree on the nomination of a prescribed body corporate by the time of the making of the determination, or
- (b) if an administrator or special administrator has been appointed to the PBC as a result of the PBC being unable to perform its native title functions, or
- (c) if the native title holders choose to avail themselves of the default body.

8.28 In essence, and subject to subparagraph (c), above, 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's functions should be limited to exercising the procedural rights attached to the native title under the NTA, undertaking consultations with and seeking the consent of native title holders about future acts which would result in the surrender of native title, and holding native title money on trust. This would need to be addressed through amendments to the NTA as well as through regulations, given that the scheme would go beyond that originally contemplated in paragraph 57(2)(c) of the NTA.

8.29 It may be appropriate for the proposed regime to provide that a body such as the Indigenous Land Corporation normally act as a default body, although the Minister could be authorised to determine a different body, either for a particular region (such as a State, or an NTRB area), or in a particular case. The legislation should require the Minister to be satisfied that the body is capable of performing the relevant functions, and to take into account the views of the native title holders.

8.30 The development of such a mechanism gives rise to a number of legal issues, on which further consultation with stakeholders within Government would be necessary.

#### **Recommendation 15**

8.31 The Australian Government should note the need to develop a mechanism for the determination of a default PBC in appropriate circumstances. The Office of Indigenous Policy Coordination should develop a comprehensive proposal 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.

## Appendix 1 - Consultations

### *Written consultations*

The Steering Committee forwarded 'issues papers' on PBCs to stakeholders in the native title system in November and December 2005. These papers were tailored to specific sectors (including PBCs, NTRBs, State and Territory Governments and industry bodies) and sought information about stakeholder experiences with and views about PBCs. In summary, papers were forwarded to the 30 PBCs in relation to which contact details were available, all NTRBs, all State and Territory Governments, and a number of peak bodies. Information was also sought from relevant Australian Government Departments and agencies.

The following organisations provided written submissions in response to the issues papers.

### *Native Title Representative Bodies*

- Central Land Council
- Goldfields Land and Sea Council
- Kimberley Land Council
- Native Title Services Victoria
- Northern Land Council
- Yamatji Marlpa Barna Baba Maaja Aboriginal Corporation

### *Prescribed Bodies Corporate*

- Mer Gedkum Le (Torres Strait Islanders) Corporation

### *State and Territory Governments*

- Victoria
- Queensland
- South Australia
- Western Australia
- Northern Territory

### *Industry Bodies*

- National Farmers' Federation
- Pastoralists and Graziers Association of Western Australia
- Rio Tinto

### *Australian Government agencies*

- Aboriginal and Torres Strait Islander Social Justice Commissioner
- Department of Agriculture, Fisheries and Forestry
- Department of Communications, Information Technology and the Arts

- Department of Employment and Workplace Relations
- Department of Environment and Heritage
- Department of Finance and Administration
- Department of Industry, Tourism and Resources
- Department of the Prime Minister and Cabinet
- Department of Transport and Regional Services
- Indigenous Land Corporation
- National Native Title Tribunal

### *Discussions with stakeholders*

Targeted bilateral consultations were also conducted with the following stakeholders.

#### *PBCs*

- Lhere Artepe Aboriginal Corporation (26 October 2005)
- Gumulgal (Torres Strait Islanders) Corporation (14 November 2005)
- Magani Lagaugal (Torres Strait Islanders) Corporation (14 November 2005)
- Mura Badulgal (Torres Strait Islanders) Corporation (14 November 2005), and
- Mualgal (Torres Strait Islanders) Corporation (14 November 2005)
- Mer Gedkum Le (Torres Strait Islanders) Corporation (15 February 2006)

#### *NTRBs*

- Central Land Council (26 October 2005)
- Ngaanyatjarra Council (9 November 2005)
- Yamatji Marlpa Barna Baba Maaja Aboriginal Corporation (9 November 2005)
- South West Aboriginal Land & Sea Council (10 November 2005)
- Kimberley Land Council (11 November 2005)
- Torres Strait Regional Authority (14 November 2005)
- Cape York Land Council (15 November 2005)
- Carpentaria Land Council Aboriginal Corporation (15 November 2005)
- North Queensland Land Council (15 November 2005)
- Aboriginal Legal Rights Movement Inc (1 December 2005)

#### *State and Territory governments*

- Western Australia (10 November 2005)
- New South Wales (6 December 2005)

- Australian Capital Territory (7 December 2005)
- Northern Territory (23 January 2006)

*Other parties*

- Chamber of Minerals and Energy, Western Australia (10 November 2005)
- Indigenous Land Corporation (11 January 2006)

## **Appendix 2 – List of Abbreviations**

<b>ACA Act</b>	<i>Aboriginal Councils and Associations Act 1976</i>
<b>AGD</b>	Attorney-General's Department
<b>AIATSIS</b>	Australian Institute of Aboriginal and Torres Strait Islander Studies
<b>CATSI Bill</b>	Corporations (Aboriginal and Torres Strait Islander) Bill 2005
<b>DAFF</b>	Department of Agriculture, Fisheries and Forestry
<b>DCITA</b>	Department of Communications, Information Technology and the Arts
<b>DEH</b>	Department of Environment and Heritage
<b>DEWR</b>	Department of Employment and Workplace relations
<b>IBA</b>	Indigenous Business Australia
<b>ILC</b>	Indigenous Land Corporation
<b>ILUA</b>	Indigenous Land Use Agreement
<b>NNTT</b>	National Native Title Tribunal
<b>NTA</b>	<i>Native Title Act 1993</i>
<b>NTRB</b>	Native Title Representative Body
<b>NTRU</b>	Native Title Research Unit (AIATSIS)
<b>OIPC</b>	Office of Indigenous Policy Coordination
<b>ORAC</b>	Office of the Registrar of Aboriginal Corporations
<b>PBC</b>	Prescribed Body Corporate
<b>PBC Regulations</b>	Native Title (Prescribed Bodies Corporate) Regulations 1999
<b>PJC</b>	Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Account
<b>RPA</b>	Regional Partnership Agreement
<b>SRA</b>	Shared Responsibility Agreement