

Reference: 2016/01380

1 December 2016

Assistant Secretary, Land Branch  
Department of Prime Minister and Cabinet  
PO Box 6500  
Canberra ACT 2600  
By email: [nativetitle@pmc.gov.au](mailto:nativetitle@pmc.gov.au)

Dear Assistant Secretary

**Response to PBC Support strategy - Consultation paper October 2016**

Thank you for the opportunity to comment on the Department of the Prime Minister and Cabinet's (PM&C) 'PBC support strategy - Consultation paper October 2016' (PBC Paper).

By way of introductory comments, the National Native Title Tribunal (NNTT) is pleased to see some progress in this area but believes the proposed strategy is too narrowly focussed, concentrating largely on funding and governance of PBCs with little consideration of other factors that potentially influence the overall strength and effectiveness of the PBC sector and which might be addressed through broader, consolidated policy framework. While funding and governance are undoubtedly important, the ability of PBCs to operate effectively and efficiently is more complex and intertwined with other issues.

Primarily, it is the view of the NNTT that any effective policy development in this area needs to strategically address tenure reform, sustainable recognition of native title rights and interests and the role of PBCs in land management. It also needs to take into consideration and make an effort to align with related policy commitments. In its current form, the PBC Paper does not acknowledge the policy agenda set forth in 'Our North, Our Future: White Paper on Developing Northern Australia' (White Paper), or the 'COAG Investigation into Indigenous Land Administration and Use' (COAG paper).

We refer to the Prime Minister's press release regarding the Government's commitment in relation to both of the above initiatives, specifically the commitment to facilitate simpler and more secure land arrangements in the north. Of relevance to the PBC Paper are the commitments it contains to develop pilot land tenure reforms, provide funding to support native title holders to engage with potential investors, the development of options to use

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exclusive native title rights for commercial purposes, and the development of new models to manage native title development funds. The PBC Paper is silent on these strategies and how the government proposes to integrate them into the broader framework for supporting PBCs.

Of equal concern is the fact that the strategy proposed by the PBC Paper does not address the need for greater coordination between organisations and agencies involved in the PBC sector. The success or failure of specific strategies will necessarily be tied to the extent to which it is integrated in any corresponding policies or initiatives being led by agencies and organisations outside of PM&C.

We also have concerns about the extent to which the PBC Paper has been developed without consultation with relevant Aboriginal and Torres Strait Islander groups. The COAG paper makes it clear that, 'Indigenous land owners and native title holders should be involved in the development of reforms that affect their ability to use their rights in land and waters'.<sup>1</sup> While the PBC Paper calls for comments from PBCs and acknowledges the central role they should play, in our view the development of such a policy framework would benefit from closer engagement with native title groups far earlier in the process.

It is also necessary to be clear about the distinction between federal and state government responsibilities. Many of the statements in the paper refer to 'governments' but it is not clear as to accountabilities and whether there will be any coordinated government efforts in this space following from the COAG investigation.

Direct funding, while supporting the independence of PBCs, contains some inherent risks which need to be carefully considered. While some PBCs may have the capacity to negotiate sustainable agreements, there are many that do not. It is our experience that unsustainable agreements often contribute to disputes about the agreement, representation, governance, implementation which require intervention and resolution. In our view it is essential that appropriate consideration is given to these issues.

We also believe that building the capacity of PBCs in itself is not enough to achieve the outcomes government is seeking. There is also a need for policy explicitly aimed at building the capacity of *government* to engage with PBCs in respectful and productive ways.

### **Specific responses to questions**

#### **1. Better engagement**

The NNTT agrees that everyone will benefit if government is able to engage more closely and effectively with PBCs to identify the pressure points they are experiencing and possible

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<sup>1</sup> COAG Paper, Guiding principle (a)

mechanisms to address these. The most appropriate way to engage should be determined by PBCs themselves.

The NNTT believes that the recently convened PBC Support Forum provides an excellent first step towards facilitating greater engagement and involvement of PBCs and the development of relevant policy. With all relevant Commonwealth government organisations and agencies at the table, as well as the National Native Title Council (NNTC), it provides a direct means for PBCs to have input into a 'whole of government' approach of proposed initiatives.

## **2. More effective, transparent, coordinated funding**

In our view, funding to support PBCs is often not reaching those organisations that are most in need of it. The current funding process requires applicants to be well resourced to identify the funding source/s and prepare and submit applications, thus compounding the disadvantage under-resourced organisations already experience. Thus, the NNTT agrees that applications for funding should be simplified to facilitate applications from all PBCs regardless of their capacity.

The suggestion, however, that PM&C be authorised to identify PBCs who, in PM&C's view require specific assistance in capacity building 'to take advantage of economic opportunities' is somewhat more problematic.

This approach could be seen to focus upon certain proponents/developments as identified by government, regardless of the wishes of the PBC. If a PBC identifies an opportunity but believes they are not resourced to respond to this, it should be open to them to approach PM&C for funding and their application can be appropriately assessed.

We suggest that a better approach would be to ensure that relevant information about possible funding and resourcing opportunities should be consolidated in one place to enable easier discovery and access. PM&C could host such information on their website, or alternatively on the PBC website currently hosted by AIATSIS. Moreover, PM&C should ensure that these opportunities are actively promoted in relevant networks in order to maximise their uptake by PBCs.

The same applies to consolidated information relating to support services available to PBCs. This work could be progressed and finalised through the PBC Support Group and the work that AIATSIS is undertaking in relation to PBC training and guidance on available funding.

## **3. Other support**

It is our position that these questions are best responded to by PBCs.

#### 4. Minor legislative and institutional role reform

The NNTT has previously provided comprehensive comment on the proposal to consider creating a low cost and final dispute resolution process. For ease of reference, this is provided again at **Attachment 1**.

In short, the NNTT believes that the appointment of such a body would assist not only PBCs, but other parties operating in the post-determination space. The NNTT is equipped and resourced to undertake such a role and, with minor legislative amendments, could be charged with the responsibility to assist PBCs with mediation and arbitration.

The NNTT has had numerous discussions with representatives of the NTRBs/NTSPs (representative bodies) regarding the issue of jurisdiction for PBC dispute resolution. The view of the representative bodies is that disputes should only be dealt with by fora with a working knowledge of native title issues. They do not want to bring disputes to Courts or other Tribunals which have no knowledge of or experience in native title. To that end the NNTT considers that the Federal Court should have exclusive jurisdiction in all matters relating to Native Title, including under the CATSI Act. That said the NNTT is ideally suited to PBC dispute resolutions. Parties could commence proceedings in the Federal Court at first instance, with the power for the Federal Court to refer matters to the NNTT for dispute resolution at the initial stages. The representative bodies clearly favour the low cost, informal dispute resolution processes already available through the NNTT.


The NNTT is of the view that the current adversarial nature of native title determination applications causes undue difficulties for native title claim groups. This is particularly evident in relation to transparency and accountability to native title holders for native title monies and for intra group disputes about membership of the community of native title holders. The NNTT considers that there should be further policy considerations given to alternative processes to the current application processes under s61. This would require serious consideration, and more extensive consultation on any proposed alternatives.

The NNTT considers much inter and intra group disputation could be avoided if a PBC was established at the commencement of a claim. The PBC would become the applicant for the purpose of the native title determination proceedings and also for the future act determinations. Any dispute within the group could be dealt with under the dispute resolution mechanisms outlined above. This would avoid the costly and divisive procedures set out under s66B. It would also accommodate the issue of which group would be the appropriate body to receive monies received under any future act negotiations. The NNTT also believes that it would set up the basic framework for the PBC in the transfer to a Registered Native Title Body Corporate post determination. The governance structure would

be already established and operative rules could accommodate post determination membership issues.

We would be pleased to discuss any aspect of this response further.

Regards

A handwritten signature in cursive script that reads "Raelene Webb".

**Raelene Webb QC**  
**President**

Reference: 2015/01984

14 September 2016

Ms Felicity Richmond  
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By email: [Felicity.Richmond@pmc.gov.au](mailto:Felicity.Richmond@pmc.gov.au)

Dear Felicity

### **Delivery of Dispute Resolution Services**

I refer to your request of 7 September 2016 relating to dispute resolution support provided by the National Native Title Tribunal (Tribunal) under s203BK(3) of the *Native Title Act 1993* (Cth) (the Act).

Your email raised a number of specific queries, which are addressed below.

1. Tribunal practice under s203BK(3)

When the Tribunal is approached to provide assistance which would fall into this category, the request is evaluated and the ability of the Tribunal to provide the requested assistance is considered.

As you would be aware, s203BK(3) assistance requires the request for assistance to be made by the relevant Native Title Representative Body (NTRB). In an instance where such assistance is requested by a party other than an NTRB, the Tribunal approaches the relevant NTRB to discuss the request and determine whether the NTRB supports the requested assistance. The NTRB would be asked to submit the request for assistance.

Once the request is made by an NTRB, the Tribunal considers the request, undertakes

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further discussion to ascertain the scope of the request and may consult with the Federal Court of Australia in order to understand how the request may impact upon any active matter before the Court.

The Tribunal considers the resourcing implications of the request for Members and staff and a recommendation to provide and appoint a particular Member, identifying any relevant staff assistance, is made to the President.

The Tribunal consideration also extends to the cost recovery requirement of the Act and this is discussed with the relevant NTRB on a case by case basis.

## 2. Current and future numbers

I can confirm that, to date, the Tribunal has provided s203BK(3) assistance on seven occasions. Additionally, there are a number of conversations currently under way with NTRBs pertaining to new assistance requests under this section of the Act.

The first instance of the provision of s203BK(3) assistance by the Tribunal was in March 2013 and there is no record of any approach being made to the Tribunal to provide such assistance prior to this period.

The Tribunal has never refused a request for s203BK(3) assistance but, as noted below, some initial approaches have not translated into formal requests for assistance.

Please note, however, the Tribunal regularly provides assistance which may involve the resolution of disputes, but this assistance may be in the form of Indigenous Land Use Agreement (ILUA) or mediation assistance and not s203BK(3) assistance. ILUA and mediation assistance is actually more common to the Tribunal as many disputes are resolved in the form of an ILUA or require the dispute to be settled to enable an ILUA to be finalised and registered.

## 3. Resources devoted

There are no Tribunal resources specifically dedicated to the provision of s203BK(3) assistance. The President and Members, along with a number of senior staff, have skills and expertise in this area and part of the consideration of the delivery of such assistance is availability of relevantly skilled personnel.

Currently, the Tribunal consists of three Members and the President. Additionally, the organisation has five accredited mediators on staff as well as a number of other experienced senior mediators who do not have formal accreditation.

In many instances, the parties will request a particular Member to provide the assistance and the Tribunal accommodates such requests if possible.

The provision of s203BK(3) assistance to date has largely involved on-country mediation, often requiring more than one meeting to achieve resolution. In one specific matter, the Member facilitated nine meetings over a four month period.

In addition to the services provided by the Member, the provision of s203BK(3) assistance often requires the input of the Tribunal's geospatial team through the provision of mapping services and/or attendance at meetings.

Members are also generally supported by one or more staff who manage logistics and correspondence.

In some instances, a senior member of staff has also assisted the Member on-country and provided co-mediation support.

#### 4. NTRBs or PBCs

The Tribunal has provided s203BK(3) assistance to both NTRBs and Prescribed Body Corporates (PBCs) but the delivery of such services to PBCs has been with the support and involvement of the relevant NTRB as required by the Act.

As the number of PBCs increase, it is timely to re-consider the required involvement of NTRBs in the provision of s203BK(3) assistance as there is currently no statutory provision allowing the Tribunal to assist PBCs to resolve disputes under this section without the involvement of the relevant NTRB.

#### 5. Types of disputes

For the seven matters where the Tribunal has provided dispute resolution assistance under s203BK(3), the issues related to:

- the establishment and governance structure of a PBC;
- disputes in relation to interests in an unclaimed area and the construct of a proposed claim;
- disputes over specific interests in particular areas; and
- claim group membership.

#### 6. Limiting factors

While the Tribunal attempts to limit the financial impost for the provision of s203BK(3) assistance for native title parties, the requirement to enter into an agreement as required by the Act can be a limiting factor in the provision of such assistance.



The type of financial agreement the Tribunal generally enters into includes the recovery of costs relating to travel and accommodation for the Member and staff providing the assistance. In some instances, the agreement has also extended to payment for the Member and staff's time to prepare for and deliver the requested assistance.

There have been a number of instances where the requirement to enter into such an agreement to pay has prevented parties from requesting assistance. In particular, an increasing number of PBCs are frustrated by this requirement.

PBCs are also restricted by the current requirement that an NTRB must request the assistance. In some instances, the dispute may be between the PBC and the NTRB, and the PBC has sought assistance from the Tribunal. However, without the agreement and the express request of the NTRB, the Tribunal is unable assist.

Additionally, there are an increasing number of intra-Indigenous disputes within PBCs which have no bearing on an NTRB and the PBC has approached the Tribunal for assistance. Currently, unless the assistance can be provided under another section of the Act, the Tribunal's ability to assist is frustrated.

The type of disputes internal to a PBC that the Tribunal has been asked to assist with include disputes relating to membership, governance, distribution of income and the determination of rights in relation to particular areas. These are important matters which require resolution and unless the dispute can be resolved, the PBC's ability to meet its obligations is compromised. Importantly, the PBC's ability to leverage economic benefits from the recognition of their native title rights and interests are also compromised if internal disputes are not settled expeditiously.

#### 7. Additional considerations

As you are beginning your deliberations in relation to the COAG recommendation to consider a system of low cost and final dispute resolution between members of the native title group and the PBC, the Tribunal takes the opportunity to provide some additional observations for your consideration.

As noted above, the Tribunal is increasingly asked to provide dispute resolution services to PBCs but is often unable to assist due to the current limitations on the Tribunal's statutory functions. As the number of PBCs increases, it is timely to consider whether these limitations should be addressed and the Tribunal provided with broader statutory functions to assist PBCs. The current requirement necessitating the assistance request be made by an NTRB is also becoming increasingly problematic and irrelevant in the post-determination environment.

Tribunal Members are appointed for their skills and experience in dispute resolution and arbitration. Additionally, as noted above, the organisation is resourced with officers who have the capacity to support the Members in the delivery of these functions. An expedient and low cost solution to the current issues related to dispute resolution within PBCs would be to extend the Tribunal dispute resolution assistance functions to PBCs and to also provide the Tribunal with the statutory authority to arbitrate where necessary.

There have been a number of instances where parties have approached the Tribunal for assistance to resolve a dispute and have indicated that they would adhere to a decision made by a Member. In some instances, the outcome of s203BK(3) assistance has been the written agreement of parties to resolutions reached with the assistance of the Member.

If the government were to extend arbitration functions for PBC disputes to the Tribunal, the regime currently in place for the future act right to negotiate could be replicated in an efficient and effective manner.

An additional function in the Act which may be utilised to resolve disputes in relation to native title determination applications is the ability for the Tribunal, under direction from the Federal Court, to hold an inquiry pursuant to s138B. While this section of the Act requires such an inquiry to relate to an application, it may be relevant to certain disputes and should be considered as a mechanism to assist parties in the resolution of such disputes.

It may also be that a special inquiry pursuant to s137 of the Act where the Commonwealth Minister can direct the Tribunal to undertake an inquiry into a particular matter or issue relating to native title may be utilised. This function appears to be broad and could be relevant to many issues giving rise to disputes within native title groups either pre- or post-determination. Sections 139B and 137 provide for the resolution of an issue in dispute.

A further consideration is that related to data. In order to fully understand the pressure points for PBCs, what disputes arise and how they could be sustainably addressed, targeted research is required to understand the number and type of disputes that are occurring and the factors that contribute to both sustaining and resolving them. To date, what little information is available is anecdotal and requires substantiation to ensure that any legislative or policy solution is both appropriately targeted and sustainable.

In 2015, the Tribunal, in partnership with the University of Queensland, applied for an Australian Research Council (ARC) Grant to undertake research into this issue. While the application was not successful in that round, the project could easily proceed outside of the ARC framework. Briefly, the project proposed a comprehensive survey of dispute resolution approaches currently being undertaken around Australia with focused research examining

specific disputes across diverse settings and jurisdictions. The Tribunal would be pleased to discuss this proposal further with PM&C.

The Tribunal is of the view that the increased request for s203BK(3) assistance reflects the complexities of the current native title system both pre- and post-determination and the formalisation of a low cost system which provides resolution to these issues is overdue.

The Tribunal's experience is that early, targeted dispute resolution assistance to native title parties is a valuable investment. Unresolved disputes tend to flare up repeatedly and become more entrenched. Government investment on a system which invests in early dispute resolution assistance would, in the Tribunal's view, create significant efficiencies within the native title system.

Thank you for the opportunity to provide this information. We would welcome further opportunities to discuss as you proceed with your considerations. Please do not hesitate to contact me should you require any clarification or further information.

Yours sincerely



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**President**

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