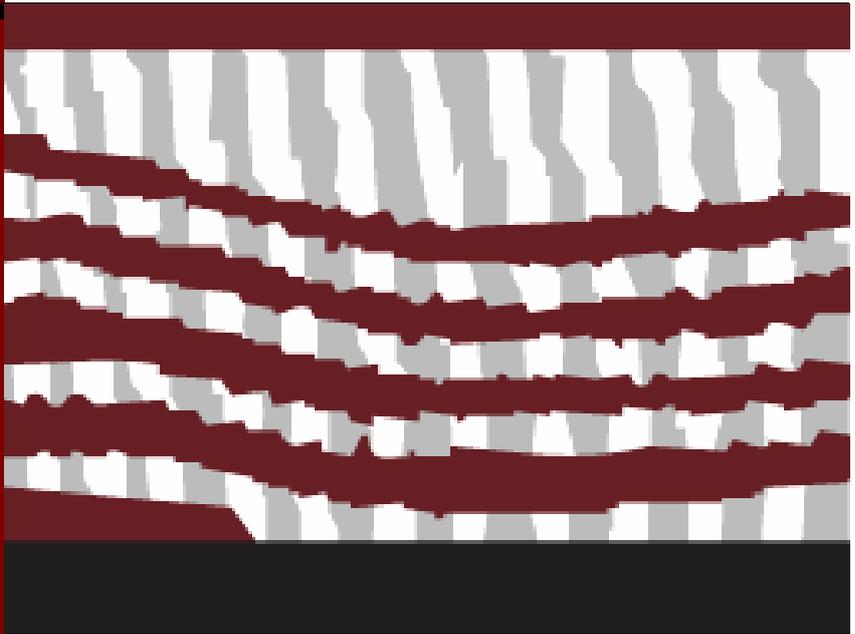


Native Title Representative Bodies
and Prescribed Bodies Corporate:
native title in a post determination
environment

Dr Lisa Strelein and Tran Tran



NATIVE TITLE RESEARCH REPORT
No. 2/2007

PBC Workshop
5-6 December 2006



AIATSIS
Australian Institute of Aboriginal
and Torres Strait Islander Studies

Native title representative bodies and prescribed bodies corporate: native title in a post determination environment.

Lisa Strelein

First published in 2007 by the Native Title Research Unit
Australian Institute of Aboriginal and Torres Strait Islander Studies
GPO Box 553
Canberra ACT 2601

The views expressed in this publication are those of the authors and not necessarily those of the Australian Institute of Aboriginal and Torres Strait Islander Studies.

Copyright © AIATSIS

Apart from any fair dealing for the purpose of private study, research, criticism or review, as permitted under the Copyright Act 1968, no part of this publication may be reproduced without the written permission of the publisher.

NATIONAL LIBRARY OF AUSTRALIA
CATALOGUING-IN-PUBLICATION DATA:

Strelein, Lisa.

Native title representative bodies and prescribed bodies corporate : native title in a post determination environment.

ISBN 9780855755935.

1. Native title (Australia). 2. Aboriginal Australians - Land tenure. 3. Councils, Aboriginal Australian. I. Tran, Tran. II. Australian Institute of Aboriginal and Torres Strait Islander Studies. Native Title Research Unit. III. Title. (Series : Research report (Australian Institute of Aboriginal and Torres Strait Islander Studies. Native Title Research Unit) ; 2).

346.940432

© Commonwealth of Australia 2007

This work is copyright. Apart from any use as permitted under the Copyright Act 1968, no part may be reproduced by any process without prior written permission from the Commonwealth. Requests and inquiries concerning reproduction and rights should be addressed to the Commonwealth Copyright Administration, Attorney General's Department, Robert Garran Offices, National Circuit, Barton ACT 2600 or posted at <http://www.ag.gov.au/cca>.

Contents

1	INTRODUCTION	1
2	PRESCRIBED BODIES CORPORATE	1
3.1	Commonwealth review of Prescribed Bodies Corporate.....	2
3.1.1	Existing sources of assistance and potential assistance	4
3.1.2	PBC governance regime	4
3.1.3	Default PBCs	6
3.1.4	State and Territory government involvement	7
3.2	Implications of the Commonwealth review	7
3.2.1	Resourcing	8
3.2.2	The scope of PBC needs	8
3.2.3	How are resources to be provided?.....	9
3.3	Scope of the review: PBCs and existing corporations	10
4	ESTABLISHING A PBC: KEY ELEMENTS IN PBC DESIGN	10
4.1	PBCs in the Western Desert.....	11
4.2	The relationship between establishing a PBC and the determination process	12
4.3	The role of law and custom in the designing the PBC.....	13
4.4	Communicating Concepts in PBC Design	14
4.5	Determining the role, objects and functions of a PBC.....	14
4.6	External factors impacting on PBC design and co-ordination of interests	16
5	DEFINING THE RELATIONSHIP BETWEEN NTRBS AND PBCS	17
5.1	Dependency Interdependency and Independence: The future of the NTRB/PBC relationship.....	18
5.2	Support needed by PBCs	19
5.3	Funding and transparency	20
6	PBC ROLES AND ASPIRATIONS.....	21
6.1	Native Title Prescribed Bodies Corporate Capacity Building Project Torres Strait Regional Authority (TSRA).....	21
6.2	Goals of PBCs and the aspirations of the native title group	23

7	FUTURE DIRECTIONS	25
7.1	Research.....	25
7.2	Resources	26
	APPENDIX 1: WORKSHOP PARTICIPANTS.....	27
	APPENDIX 2: PBC FUNCTIONS AND OBLIGATIONS.....	29

Table of abbreviations

ACA Act	<i>Aboriginal Councils and Associations Act 1976 (Cth)</i>
AGD	Attorney General's Department
AIATSIS	Australian Institute of Aboriginal and Torres Strait Islander Studies
ATSIC	Aboriginal and Torres Strait Islander Commission
CATSI Act	<i>The Corporations (Aboriginal and Torres Strait Islander) Act 2006 (Cth)</i>
CATSI Consequential Act	<i>Corporations (Aboriginal and Torres Strait Islander) Consequential, Transitional and Other Measures Act 2006 (Cth)</i>
CLC	Central Land Council
FaCSIA	Department of Families, Community Services and Indigenous Affairs
ILC	Indigenous Land Corporation
ILUAs	Indigenous Land Use Agreements
KLC	Kimberly Land Council
NHT	Natural Heritage Trust
NLP	National Landcare Programme
NNTT	National Native Title Tribunal
NRM	Natural Resource Management
NTA	<i>Native Title Act 1993 (Cth)</i>
NTRBs	Native Title Representative Bodies
NTRU	Native Title Research Unit
NT(PBC) Regulations	<i>Native Title (Prescribed Bodies Corporate) Regulations 1999 (Cth)</i>
OIPC	Office of Indigenous Policy Coordination
ORAC	Office of the Registrar of Aboriginal Corporations
PBC	Prescribed Bodies Corporate
TSRA	Torres Strait Regional Authority

Acknowledgements

This report was prepared by Dr Lisa Strelein and Ms Tran Tran based on the presentations by key speakers and discussion sessions held at the workshop, 'NTRBs and PBCs: Current Policy and Practice Workshop for NTRB Staff', AIATSIS Canberra, 5-6 December 2006. Thanks, also, to Ms Toni Bauman and Ms Jessica Weir provided substantial comments on earlier drafts.

The AIATSIS Prescribed Bodies Corporate research project is supported by our Native Title Research and Policy Advice contract with the FaCSIA Land Branch; our project sponsors, the Minerals Council of Australia; our project partners, the Office of the Registrar of Aboriginal Corporations and our international research partners, the Centre for Indigenous Governance and Development, Massey University.

1 Introduction

The Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) has embarked on a research and resource project to develop greater understanding of the Prescribed Bodies Corporate (PBC) environment, native title holder aspirations and to bring together resources and develop networks that may be of benefit to them. The first of a series of workshops was held by the Native Title Research Unit (NTRU) at AIATSIS in Canberra on 5-6 December 2006. The workshop was attended by Native Title Representative Bodies (NTRBs) who have been or will be involved in the design and establishment of PBCs following a determination of native title (see Appendix 1). Participants also included government representatives from the Department of Families, Community Services and Indigenous Affairs (FaCSIA) and Attorney General's Department (AGD) who gave presentations on the proposed changes to PBCs as a part of the Australian Government's broader native title reforms. This report is based on the major issues, themes and discussions that arose during the workshop. In particular, it focuses on measures to improve the effectiveness of PBCs and coincides with the Government's recognition of the need for resources and support for PBCs to adequately carry out their functions.

Workshop participants were provided with an opportunity to comment on the reform proposals and to share and discuss their experiences. AIATSIS intends to follow this workshop with a meeting of PBC representatives in 2007, in conjunction with a broader research project and the development of resources for use by PBCs. The workshop, and this report, reflects the perspective of NTRB staff working with PBCs, and not the views of PBCs themselves. All of the participants acknowledged the need for PBCs to be consulted and provided an opportunity to share their experiences and inform policy and research deliberations. Participants strongly supported the planned AIATSIS workshop for PBCs.

2 Prescribed Bodies Corporate

With the increasing number of successful determinations across Australia, PBCs have emerged as a key element within the native title system. Under the *Native Title Act 1993* (NTA) PBCs are established for each native title determination in order to hold in trust or manage the native title rights and interests on behalf of the native title holders. PBCs are currently regulated by the NTA, the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth) (NT(PBC) regulations), and the *Aboriginal Councils and Associations Act 1976* (the ACA Act). From July 2007 the ACA Act will be replaced by the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) (CATSI Act) and the *Corporations (Aboriginal and Torres Strait Islander) Consequential, Transitional and Other Measures Act 2006* (Cth) (CATSI Consequential Act).

In the design of the native title system, it was anticipated that all dealings with native title holders will occur through PBCs. The primary functions of PBCs are to:

- protect and manage determined native title in accordance with the objectives of the native title holding group; and
- ensure certainty for governments and other parties interested in accessing or regulating native title land and waters by providing a legal entity to manage and conduct the affairs of the native title holders.¹

PBCs need to operate effectively so that native title holders are able to utilise and maximise their native title rights and engage meaningfully in land management. Concerns have been raised that very few PBCs are able to fulfil the functions intended under the legislation or the aspirations of the native title holders. Over the last ten years there have been increasing demands from diverse sectors for greater investment in PBCs. There are now 42 PBCs,² which is a critical mass of organisations with a range of opportunities, expectations and challenges.

3 The Current Legal and Policy Context

The current imperative to understand and document the emerging roles, structures and functions of PBCs occurs within the context of significant changes to the native title system. In September 2005 the Government announced a package of reforms to the native title system in order to improve the effectiveness of NTRBs; review any technical amendments required to the NTA; review the claims resolution process and how that process is managed by the National Native Title Tribunal (NNTT) and the Federal Court; increase dialogue between State and Territory Governments and native title parties; improve procedures for granting financial assistance to non-claimants; and examine measures to encourage the effective functioning of PBCs.

3.1 Commonwealth review of Prescribed Bodies Corporate

On 27 October 2006, the Attorney-General and the Minister for FaCSIA released a report examining the structures and processes of native title PBCs (the PBC Report). The Commonwealth's review of PBCs was carried out by a Steering Committee chaired by AGD and comprised of officers from AGD, FaCSIA and the Office of the Registrar of Aboriginal Corporation (ORAC). Steven Marshall (Assistant Secretary, AGD), Greg Roche (Assistant Secretary, FaCSIA) and Rebecca Bigg-Wither (Senior Legal Officer Officer, FaCSIA) outlined the details of the PBC Report at the workshop.

¹ Attorney General's Department *Structures and Processes of Prescribed Bodies Corporate* (2006). See Appendix 2 for full detail.

² At 30 September 2006.

Steven Marshall noted that the purpose of the PBC Report was to:

- identify basic functions and resource needs of PBCs;
- ensure functions and resources are aligned with existing funding sources; and
- assess the appropriateness of the existing statutory governance model.³

The report identified:

- the need for a greater understanding of the functions, needs and responsibilities of PBCs among all stakeholders in the native title system;
- the need for a more coordinated effort in pulling together resources that already exist that PBCs can utilise; and
- that the needs of PBCs will differ greatly, depending on various factors (such as geographical location and type of likely Future Act activity).⁴

The key recommendations of the report included measures to:

- improve the ability of PBCs to access and utilise existing sources of assistance, including from NTRBs;
- authorise PBCs to recover costs reasonably incurred in performing specific functions at the request of third parties;
- encourage greater State and Territory government involvement in addressing PBC needs; and
- improve the flexibility of the PBC governance regime while protecting native title rights and interests.⁵

All of the report's recommendations have been accepted by the Government, some of which will be implemented through the amendments to the NTA that are currently being debated in the Senate and likely to come into force during April 2007. The *Native Title Amendment Act 2007* was passed by the Parliament on 28 March 2007 and is expected to commence in April 2007. A further two recommendations will be partially implemented by the *Native Title Amendment (Technical Amendments) Act 2007* which was passed by Parliament on 20 July 2007. The amendments also coincide with the changes made by that will be made by the CATSI

³ Steven Marshall 'Examination of Structures and Processes of Prescribed Bodies Corporate' (Presentation delivered at the NTRBs and PBCs: Current Policy and Practice Workshop for NTRB Staff, AIATSIS, Canberra, 5 December 2006).

⁴ Steven Marshall 'Examination of Structures and Processes of Prescribed Bodies Corporate' (Presentation delivered at the NTRBs and PBCs: Current Policy and Practice Workshop for NTRB Staff, AIATSIS, Canberra, 5 December 2006).

⁵ *Structures and Processes of Prescribed Bodies Corporate* (2006) Attorney General's Department, <[http://www.ag.gov.au/www/agd/agd.nsf/Page/Indigenoulawandnativetitle_Nativetitle_Prescribedbodiecorporat\(PBCs\)>](http://www.ag.gov.au/www/agd/agd.nsf/Page/Indigenoulawandnativetitle_Nativetitle_Prescribedbodiecorporat(PBCs)>) at 15 December 2006.

Act, which scales the corporate governance requirements according to the size of the corporation and contains specific provisions tailored to PBCs.

3.1.1 Existing sources of assistance and potential assistance

The PBC Report focuses on how resources currently available within the native title system can be used more effectively to support PBCs and the need to build the capacity of PBCs to access and utilise existing sources of assistance especially from NTRBs. The report recommended:

- measures to ensure PBCs have better access to information about potential sources of assistance;
- the need for greater clarity about the assistance NTRBs can already provide to PBCs (ie, NTRBs can already use their native title program funding to perform their statutory functions in relation to PBCs at any time, for example, by assisting PBCs to negotiate future act agreements);
- that NTRBs should be required to give appropriate priority to performing functions associated with assistance to PBCs;
- that NTRBs should be able to assist PBCs with their day to day operations in certain circumstances; and
- that PBCs should be authorised to charge future act proponents for reasonable costs incurred in performing their native title functions (for example, where the proponents want to have a future act processed more quickly than would be possible if support was provided through an NTRB).⁶

3.1.2 PBC governance regime

The PBC Report also identified how the existing statutory and regulatory model, prescribing the way PBC functions are exercised, imposes onerous burdens on PBCs. It concluded that the PBC governance regime needs to be more flexible to accommodate the specific circumstances of native title holders, while protecting native title rights and interests. The report recommended that:

- statutory requirements for PBCs to consult with and obtain the consent of native title holders on ‘native title decisions’ should be limited to decisions to surrender native title rights and interests; and
- an existing PBC should be able to be determined as a PBC for subsequent determinations of native title where all of the native title holders agree.

This means that legislatively mandated consultation with native title holders would be limited to situations where there is a potential surrender

⁶ Steven Marshall ‘Examination of Structures and Processes of Prescribed Bodies Corporate’ (Presentation delivered at the NTRBs and PBCs: Current Policy and Practice Workshop for NTRB Staff, AIATSIS, Canberra, 5 December 2006).

of native title rights and interests. Native title holders will still be able to stipulate other additional mandatory consultations as part of the rules or constitution of the PBC. Further, a distinct PBC will not be required by every determination of native title. This means that claim groups, where it is agreed, may be able to use existing structures and pool resources into maintaining them.

The recommendations of the review of PBCs will be implemented through a combination of amendments to the NTA, changes to the regulations as well as administratively, for example, through the greater prioritisation of PBCs in NTRB activity plans and encouraging the cooperation of the State and Territories. The relevant legislative and regulatory changes to the NTA are summarised in Table 1 below.

Provision	Legislative changes	Implications
Subpara 24MD(6B)(c)(iii)	'Registered' is inserted before 'native title body corporate'	Makes technical amendments to sub para 24MD(6B)(c)(ii)
Sub para 58(e)	Enables measures to remove statutory requirement for PBCs to consult with the common law holders on all decisions affecting native title.	Aims to remove burden on PBCs and limit compulsory consultation to decisions that relate to the surrender of native title rights and interests on land or waters. (This is a default provision only – there may be a higher threshold stipulated by the rules of the PBC itself).
s 58 - <i>Native Title (Prescribed Bodies Corporate) Regulations 1999</i> (Cth) – regulations relating to agreement making	Section 58(e)(i) limits the power to make regulations for agent PBCs such that agent PBCs would need to consult with and obtain the consent of the common law holders to all agreements concerning native title. There is no such requirement for trust PBCs. This will be removed.	This enables the regulations to allow agent PBCs to enter agreements if they have been made in accordance with the processes stipulated in the regulations.
Proposed s 59A (s 59A(3) allows regulation changes) – using existing PBCs in subsequent determinations	Enables existing PBCs to be determined as a PBC for subsequent determinations of native title where the native title holders covered by all determinations agree to it.	Encourages economies of scale in PBCs especially where there have been determinations in multiple areas for the same claim groups such as for example, in Miriungung Gajerrong.
	Amendments will also be made to the PBC	Note that the existing PBC structure can not be

	regulations to prescribe how the consent of the common law holders for the existing PBC and those proposing the use of the existing PBC is to be obtained.	changed (eg from agent to trust) for subsequent determinations.
S 253 – Definition of an agent PBC	This definition would already be inserted by Schedule 1 of the <i>Corporations (Aboriginal and Torres Strait Islander Consequential, Transitional and Other Measures Act 2006</i> (CATSI Consequential Act) when that Act commences on 1 July 2007.	The changes incorporate the definition into the NTA before 1 July 2007. This new definition is related to the insertion of s 59A and corrects a technical error. ⁷

Table 1 Major changes to the NTA (and relevant regulations) concerning PBCs.⁸

3.1.3 Default PBCs

Under s 57(2)(c) of the NTA where native title holders do not nominate a PBC, the Court must determine which body corporate will perform the functions of the PBC. This contemplates a regime for default PBCs and is intended to deal with the considerable uncertainty created for third parties where there is not a functioning PBC to represent native title rights and interests. However there are no regulations prescribing how a default PBC would function. The reforms are intended to address this.

The *Native Title Amendment (Technical Amendments) Act 2007* allows for default bodies to be used where native title holders cannot agree on the PBC at the time of a determination, a liquidator has been appointed to a PBC, or if the native title holders choose to avail themselves of the default body.⁹ The default PBC is considered to be an option of last resort and will hold native title rights temporarily for the native title claim group until a new PBC is formed (for example, by order of the Federal Court). The functions of the default PBC would be limited to exercising procedural rights, conducting consultations and obtaining consent from native title holders in Future Acts.

It is intended that the default PBC will not ‘confiscate’ native title rights and interests given. There is a large incentive for native title holders to develop a new PBC to regain their title. Default PBCs would have to consult with the native title holders and require their consent when making decisions. In effect the default PBC would subsume the administrative

⁷ See Explanatory Memorandum, *Native Title Amendment Act 2006*, [4.10]-[4.11].

⁸ Explanatory Memorandum, *Native Title Amendment Act 2006*, [4.1]-[4.11].

⁹ This builds on recommendation 15 in the Attorney General’s Department *Structures and Processes of Prescribed Bodies Corporate* (2006), 28 [8.28].

functions of the former PBC but enable native title holders to maintain their decision making powers. The PBC Report proposes using bodies such as the Indigenous Land Corporation as the default body or a body appointed by the Minister such as the relevant NTRB. The *Native Title Amendment (Technical Amendments) Act 2007* allows a particular default body or bodies to be prescribed.

It was considered by most workshop participants that a default PBC structure should only be used in limited circumstances. They noted that it was preferable that PBCs were designed adequately in the first instance in order to ensure their long term survival.

3.1.4 State and Territory government involvement

The PBC Report identified that State and Territory governments have the primary responsibility for the day to day management of land. They are often directly engaged in dealings with PBCs. To this end, the PBC Report encouraged State and Territory government to address PBC needs as part of the resolution of native title claims as well as promoting a better understanding of the functions, needs and responsibilities of PBCs. It is also preferable that this engagement occurs earlier on in the process enabling native title holders to consider the type of body they would like to be running and the functions it will need to serve in relation to the State or Territory. For example, in Alice Springs, the Northern Territory Government has recognised the need to support the Lhere Artepe PBC in its central role in relation to development. However, questions were raised at the workshop as to whether it is realistic to expect the States to fund PBCs where they have little interest in the land, for example, in areas where there are only limited Future Act activities. Thus, this policy approach risks an uneven distribution of resources and potential compounding of disadvantage for many PBCs.

3.2 Implications of the Commonwealth review

At the AIATSIS workshop, Greg Roche and Rebecca Bigg-Wither discussed some of the implications of the PBC Report. In particular, the intention to provide increased assistance to PBCs through the NTRB system. In accordance with existing administrative arrangements, primary administrative and policy responsibility will rest with within FaCSIA to oversee the implementation of the Recommendations. The reforms proposed for PBCs are based on the need to address:

- information sharing and support needs;
- resourcing;
- minor legislative changes; and
- governance and decision-making.

3.2.1 *Resourcing*

It was noted that NTRBs have always been able to use their native title program funding to *perform their statutory functions in relation to PBCs* (eg, by assisting PBCs to negotiate future act agreements). NTRBs' ability to provide such assistance has never depended on whether a PBC has held its first annual general meeting. This has not been well understood, and the PBC Report recommended that steps be taken to clarify current arrangements.

The NTA does not preclude allowing NTRBs to use their native title program funding to also assist PBCs with their *day-to-day operations* (eg, purchasing infrastructure and utilities). Nor does it preclude direct funding of PBCs for these purposes. However, the Government has been reluctant to commit resources to funding the day-to-day operations of PBCs, with an expectation that PBCs would find such resources from State or Territory governments, government programs relevant to their activities or private sources. Specifically, previous policy positions of the Aboriginal and Torres Strait Islander Commission (ATSIC) and the Office of Indigenous Policy Coordination (OIPC) have limited the ability of NTRBs to support PBCs in their day-to-day operations to the period up to the first Annual General Meeting.

The reform process has provided an opportunity for greater clarification of the Government's position and has resulted in a recognition of the need for a level of basic funding and support for PBCs' day-to-day operations. Greg Roche confirmed the Government's position that PBCs resource issues would be addressed in three ways:

- FaCSIA ensuring that NTRBs give appropriate priority to assisting PBCs when funding NTRBs;
- FaCSIA will allow NTRBs to use their native title program funding to assist PBCs with their day-to-day operations (with FaCSIA's prior approval);
- FaCSIA will consider direct funding for PBCs (ie, funding provided other than through NTRBs) to assist with day-to-day operating costs in limited circumstances.
- PBCs will be able to charge third parties for performing certain functions.

3.2.2 *The scope of PBC needs*

There are a number of issues which relate to the scope of resourcing needs for PBCs including:

- How many PBCs will there be?
- What is the role of the PBC? Is it just a land holder or is it also an economic development agent?
- What is the relationship between resources and PBC functions?
- What is already provided through the statutory functions of NTRBs?

It is proposed that funding commitments will be premised on the perceived and anticipated functions of PBCs. The government has estimated that there is likely to be 100 to 150 PBCs established in the future with a significant proportion in the Torres Strait, calculated on the number of extant claims and likelihood that they would reach a final determination. Some workshop participants questioned whether this may be somewhat conservative. However, this has always been a policy concern for governments given the intergenerational nature of native title, that a relatively large cohort of statutory organisations might require funding, effectively in perpetuity.

There is limited information on what is needed for the operation of PBCs (especially in terms of the support offered by or through NTRBs) and further consideration is required as to the nature of the relationship between PBCs and NTRBs. (This is discussed further in Part 5 of this workshop report). It is expected that some PBCs intend to perform their statutory functions in dealings with land as well as to operate as agents for economic change. At minimum, PBCs will require ongoing administrative support (including responding to the new CATSI legislation). If a PBC is established simply to hold land, or they occupy an area with little likelihood of economic returns, the administrative requirements may be minimal but nevertheless unfunded.

Greg Roche noted that the level of support required by a PBC will vary significantly and FaCSIA is considering funding options to cater for a spectrum, from high functioning PBCs to highly dependent PBCs. On one end of the spectrum, there are a good number of PBCs which have a very low level of demand on them, particularly in the area of Future Acts. These PBCs will be required to perform their statutory functions very irregularly and thus require a low level of support. On the other hand, high functioning PBCs may be self-funding, especially where they have successfully negotiated resource agreements and obtained compensation. It was acknowledged that instances of the latter are rare and that many PBCs are located somewhere between these two groups. It is expected, then, that some PBCs will require ongoing support for basic functions and maintenance of business infrastructure. In particular, support and resources are needed early on to ensure that the native title holders have the capacity to make informed decisions about how they will use and manage their land.

3.2.3 How are resources to be provided?

Greg Roche noted that FaCSIA resources will be targeted at ongoing support for PBCs through NTRBs. Over time, it is expected that PBCs may also source funding through other government agencies and programs. Providing for administrative capacity attempts to address concerns about the need for basic infrastructure and capacity in order to apply, manage and acquit appropriated funding from other government departments and carry out the basic future act and legislative compliance functions under the NTA and CATSI Act.

Under the new policy, NTRBs will be able to include support for day-to-day operations of PBCs in their activities under their Program Funding Agreements with FaCSIA. It is anticipated that there will be circumstances where PBCs will request direct funding, independent of the NTRB, but this will not be the Government's preferred option.

Funding PBCs through NTRBs creates administrative efficiencies for the Government by transferring compliance monitoring to the NTRB, as well as combining funding and support functions. However, the use of NTRBs as intermediaries raised some concern at the workshop. There were concerns, for example, that providing funding and support through NTRBs will increase the burden on NTRBs which are already faced with resourcing and capacity issues. NTRB prioritisation of native title claims already sees some claim groups receiving less support than others and insufficient resources to undertake what is required to progress the number of extant claims. Without additional NTRB resources (both in terms of personnel and financial infrastructure), the impact on claims resolution may be significant.

From a more philosophical perspective, some participants raised concerns about creating a relationship of dependency between NTRB and PBCs rather than fostering the autonomy and independence of the PBCs. The government confirmed that the recommendation that NTRBs will be able to support PBCs in their day-to-day operations is not intended as a permanent solution for the viability of PBCs, as the commitment of funds in perpetuity remains a real policy and budgetary concern. Other sources of funding and capacity building initiatives must be identified to ensure the long term effectiveness of PBCs.

3.3 Scope of the review: PBCs and existing corporations

The reforms proposed by the government in the PBC Report, do not account for the needs of corporations, for example that may have been established by native title groups prior to a determination or established in lieu of a PBC to manage alternative settlements or established alongside the PBC to manage other funds or economic development opportunities. Such organisations may already carrying out many of the likely functions of PBCs such as the management of Future Acts, negotiating a range of native title related agreements, and managing related benefits. There is little understanding of the growing corporatisation of native title groups and the different structures that surround a native title settlement. The relationships between such organisations and PBCs need to be considered carefully when determining the operating environment for PBCs.

4 Establishing a PBC: key elements in PBC design

The process of establishing a PBC is unique to each claim group, their decision making structures and their aspirations. How the PBC is designed has major implications for its success. All PBCs are established within the dynamics, capacity and resources of the stakeholders involved and processes must be tailored to their needs and interests.

A substantial amount of work is required prior to establishing a PBC, especially between NTRBs and claim groups, in order to determine the rules of the PBC, explain the implications of the trustee and agency relationship, ensure that the concerns and aspirations of the claim group are met, and to consider how to incorporate traditional decision making structures into the PBC structure and rules.

4.1 PBCs in the Western Desert

Sian Hanrahan and Malcolm O'Dell from the Ngaanyatjaara Council delivered presentations at the workshop highlighting issues they have identified in the western desert in setting up PBCs.

In the Ngaanyatjaara NTRB area there are currently five¹⁰ native title groups that have PBCs or are in the process of establishing one. The governance structures that each group has chosen varies according to the particular composition of each claim group and the way that decisions are made. They are summarised below in Table 2.

Determination	PBC	Structure
Kiwirrkurra Determination <i>Brown v State of Western Australia</i> [2001] FCA 1462	Tjamu Tjamu Aboriginal Corporation	Elected from the community (democratic)
Spinifex Determination <i>Mark Anderson on behalf of the Spinifex People v State of Western Australia</i> [2000] FCA 1717	Pila Nguru Aboriginal Corporation	Family groups and family councils
Ngaanyatjarra Lands Native Title Claim <i>Mervyn & Ors on behalf of the Peoples of the Ngaanyatjarra Lands v State of Western Australia</i> [2005] FCA 831	Yarnangu Ngaanyatjarraku Parna Aboriginal Corporation	Existing corporate structure based on communities
<i>James on behalf of the Martu People v Western Australia</i> [2002] FCA 1208 (27 September 2002).	Western Deserts Land Corporation (Jamukurnu-Yapalikunu)	Structures based on geographic areas

Table 2 PBCs in the Ngaanyatjarra area

¹⁰ Note that the Tjurabalan PBC falls within the Ngaanyatjaara NTRB area but has been managed by the Kimberley Land Council.

In the example of the Ngaanyatjarra Lands Native Title Claim, pre-existing corporate structures meant that associated decision making processes could be replicated in the PBC structure. The PBC structures of the Martu and Spinifex claims, were informed by anthropological information which suggested particular ‘traditional’ decision making processes and related laws and customs that could be incorporated into the PBC structure.

4.2 The relationship between establishing a PBC and the determination process

The determination of a PBC follows a successful litigated or consent determination of native title rights and interests. The size and complexity of the claim group and its capacity, the availability of resources, and the nature of pre-existing related corporations and their structures will impact the level of work that is necessary to establish a PBC. For example, the PBC for the Ngaanyatjarra Lands Native Title Claim was based on a pre-existing corporate structure involving the NTRB and the Ngaanyatjaara Council, both of which have been in existence for some time and have at least some resources. In contrast, the Martu claim involved a number of disparate groups spread over different areas without existing corporate infrastructure that would lend themselves to a PBC structure. This meant that the design of a PBC for the subsequent determination needed to be workshopped far in advance, and with greater investment of time and effort, to ensure that a PBC could be established within a reasonable time after the determination of native title.

Gaps between the timing of the establishment of a PBC and the handing down of a determination of native title rights and interests can create significant problems especially in relation to dealing with Future Acts where there is neither a PBC nor applicants to sign off on agreements. Where it is anticipated that a consent determination is likely to be reached, it is possible to begin discussions on the formation of a PBC much earlier in the process, as crucial issues such as the nature and extent of the claim group and the traditional decision making structures are part of the negotiated outcomes, rather than awaiting a final litigated determination of these issues. It is important to take advantage of this opportunity in order to not only ease the transition of the management of native title rights and interests but to also maximize limited resources available to conduct on country meetings with claimant communities. Pre-planning the structure of the PBC also means that the Federal Court can make concurrent determinations of native title and of the PBC. Further, establishing the rules of the PBC prior to a consent determination, with careful consideration of connection materials, can also minimize conflict especially in relation to the distribution of benefits from agreements prior to or ancillary to the determination.

The situation is different in litigated determinations where the final decision about the nature of the native title group and the content of native title rights and interests is decided by the Court. Litigated determinations can create uncertainty about the ultimate functions and purposes of the PBC and subsequently the design and rules that need to be adopted. A

participant from the Central Land Council (CLC) commented that in the case of the Lhere Artepe Aboriginal Corporation, it had not been possible to design the PBC before the determination. The claim involved three estate groups and there was little indication of the likely success of the claim, including whether all three groups would be recognised exactly as claimed. In these circumstances, the substantive work of designing the PBC could not be carried out until the determination was finalised.

4.3 The role of law and custom in the designing the PBC

There was significant debate among participants at the workshop over the extent to which PBCs can and should be reflective of the traditional laws and customs of the native title claim group. Opinions differed as to whether the rules governing PBC decision making processes should emulate how decisions are made on country or indeed whether they ever could successfully reflect such decision making processes. Some participants noted that law and custom was intrinsic to native title, commenting that replicating ‘internal’ or ‘traditional’ decision-making processes in the PBC could reinforce the systems of law and custom and rights and interests that native title recognises and protects. Moreover, the imposition of ‘corporate’ decision-making processes could lead to the demise of more ‘traditional’ processes and undermine native title itself.

Other workshop participants insisted that there are limits to the extent to which aspects of dynamic social and political life should be incorporated into PBC structures. They argued for the distinct separation of ‘traditional’ decision making processes and political life from legal corporate processes. Some participants were of the view that a hybrid decision making structure was not possible without undermining traditional decision making authority, while others noted that the integration of the two systems into a written constitution or rules could mean the ‘codification’ of what are dynamic social processes, making it difficult for the PBC to evolve according to changing circumstances.

While these questions are of central importance to the design and sustainability of PBCs and should be discussed and debated with the claimant group, it is not the intention to suggest here any reification of culture and commerce as dichotomous and incompatible. Perhaps the greatest concern is to avoid bringing the decision making of the PBC into conflict with the traditional decision making authority among the group. Some PBC structures deliberately try to accommodate this, where, for example, governing committees are structured around family representation, which reflects traditional decision making but the method by which family representatives are nominated is outside the PBC rules. This flexible approach also minimises the risk of oversimplifying complex social and political dynamics into a limited set of corporate documents.

Each community must consider how, or if, their governance structures account for the involvement of the range of groups in the community, including the roles of young people, older people, women and diaspora within the claimant community. In some cases the corporate governance

has been distinguished from the social and cultural authority through the creation of a 'bicameral' governance structure in which and Elders Council has only limited authoritative roles and responsibilities. Workshop participants also noted the benefit of managing the business of the native title group in ways that enable the native title group to capitalise on the skills and knowledge base of its members.

4.4 Communicating Concepts in PBC Design

Under the NTA, PBCs can either be established as an agent or trustee for the native title holders.¹¹ Understanding the relative benefits and detriments of each of these models can become complex when applied to each particular claim group. This choice is particularly important to properly informing native title claim groups about the possible PBC structures and their implications.

There is a need to be sensitive to native title holder perceptions of PBC models, terms and legal concepts. Trust structures may be seen as detracting from the autonomy of the broader claim group and as taking away the control of its members over their native title rights in interests. Control can be seen to be transferred to third parties and native title as being removed as soon as it has been won. The legal reality may be quite different, as trustees must act in the interests of the beneficiaries whereas agents must use their best judgement. In the Ngaanyatjarra Lands experience, the trustee model was opted for because it matched conceptions of caring for country for future generations.

The kinds of consultations and information sessions required to discuss agency and trust arrangements will vary significantly according to the relative capacity of the group to understand the concepts involved, based on factors such as their familiarity with similar or other corporate structures as well as general literacy and language differences. Workshopping key concepts of PBC design are central to developing rules of the PBC that are consistent with the needs and aspirations of the claim group. This may involve employing external experts, visual aids and careful use of language and terminology to ensure informed decision making. Anthropologists and linguists can play a key role in ensuring cross cultural communication, translating concepts into Indigenous languages and metaphors where required to articulate legal concepts and the choices that needed to be made. Ngaanyatjarra gave an example of some of the visual aids used in describing trust and agency models to native title holders. And it was recommended that examples of such aids should be shared amongst NTRBs to assist those who are about to embark upon PBC design.

4.5 Determining the role, objects and functions of a PBC

The final structure of the PBC will be influenced by the purposes it is intended to achieve. There was discussion at the workshop about the role

¹¹ *Native Title Act 1993* (Cth), s 59.

of the PBC within the broader social and cultural governance framework of the native title group and the community. Native title groups who wish to engage in broader social, economic and cultural activity post determination may wish to pursue these functions through the native title holding body – the PBC.

However, the view of a number of workshop participants, was that the objects of the PBC should be limited to holding and managing native title rights and interests. Essentially, it is argued that the more limited the scope of the PBCs activities, the lower the chance of corporate failure and risk to the native title assets. While native title itself may be protected by law, particularly under the new CATSI Act, the failure of a PBC could ultimately compromise the ability of the organisation to effectively manage, or even hold, native title rights and interests for the claim group. It was therefore seen as preferable to separate the native title management functions of the PBC from other functions such as housing and economic development, even though these functions are not necessarily mutually exclusive. There is a need to review this rationale in light of new legislative regimes concerning PBC obligations under the CATSI Act and Amendments to the NTA, which provide further protection to native title by separating out directors duties from the duties to protect native title. The default PBC proposal also seeks to provide additional protection for native title in the case of corporate failure. Where native title delivers on potential for economic development and asset growth over the long term, investment and diversification will need to be addressed along with the accountability to the community to deliver and support social and cultural outcomes. The potential for complex corporate and social governance structures to build up around the native title group is an issue that requires further investigation to support greater and better informed corporate planning. This will be the subject of the AIATSIS research project.

A critical question for some PBCs will be simply whether the organisation is seen as relevant. In one example in the Western Desert the PBC has fallen into disuse. Future Act proponents had begun seeking approval for ventures on their lands, and the capacity of their PBC to respond was critical. A critical question Ngaanyatjarra made a significant investment of twelve months of monthly meetings to enable a native title group to understand the ongoing importance of maintaining the functions of the PBC. For them the support of the NTRB post-determination and subsequent to the establishment of the PBC has been definitive.

Participants related experiences where substantial pressure was felt from proponents to design and implement a functional PBC quickly. In the case of the Lhere Artepe PBC, there was pressure from the Northern Territory Government to ensure the PBC was ready for future development in the claim area. Being a litigated determination, work on the PBC design was delayed until after the court's decision. The CLC and the native title groups resisted external pressure and established a steering committee to design the PBC over a two year period. During that time the steering committee investigated potential issues that the PBC would face, including specific Future Acts considered how they would respond and incorporated that information into the design of the PBC. Knowing the core functions

and tasks of the PBC in advance was also useful in ensuring that members of the PBC were ready to make the necessary decisions and manage the benefits that would flow from the Future Act agreement.

The eventual scope of PBC activities will depend on a number of factors including the resources available to the PBC, the geographical location of the PBC, whether it is in a settled or remote area, the natural resources of the area, the potential for future agreements, and the dynamics between the PBC and other organisations.

4.6 External factors impacting on PBC design and co-ordination of interests

There are a number of external stakeholders impacting on PBC design, in particular the need to co-ordinate PBC design with other Indigenous organisations in the area covered by the proposed PBC whose interests may overlap, intersect and sometimes compete with those of the PBC. Even within the native title process existing corporations may have carried out native title functions prior to the establishment of the PBC, including negotiating ILUAs and managing benefits. Ideally such corporations can map directly on to the PBC design, but this may not always be possible. For example, where competing applicants have incorporated and signed agreements, or where the determinations is more limited than the claim. In addition there may be Indigenous representative or service delivery organisations who carry out similar functions to those to which the PBC aspires. In Queensland, for example, local community councils often hold significant authority and have a range of service provision responsibilities within their region. Some Indigenous organisations may also have interests in land ownership and management and cultural heritage issues.

The roles of these other bodies need to be borne in mind when designing the PBC to negotiate how core functions can be complementary rather than duplicating and competing with each other into the future. The functions of such Indigenous organisations may be based on the representation of all residents not only traditional owners. Where these interests have the potential to conflict with those of native title holders, the relationships may require mediation as the authority of native title holders (and traditional ownership) is strengthened by the native title process.

PBCs may have expectations that, as they become established, they will take over the roles of other organisations. This creates the potential for conflict, especially where overlapping legislative regimes give rise to uncertainty of roles (for example, land rights and cultural heritage). Forming linkages with other governance bodies within communities in the design of PBCs is critical. Participants were aware of only a few memorandums of understanding or agreements between native title groups and organisations, particularly involving PBCs, although there are some on a bigger regional scale, such as the Murray and Lower Darling Rivers Indigenous Nations, the Rainforest Aboriginal Council or the South Australian Congress. NTRBs have already achieved a significant degree of regional coordination under the NTRB system. As native title holders seek greater autonomy and authority through the PBC, the role of NTRBs may

change and potentially diminish overtime. Nevertheless, participants felt strongly that regional coordination should be maintained. Whether through existing NTRBs or other regional bodies, the basis of such alliances may require (ongoing) negotiation.

5 Defining the relationship between NTRBs and PBCs

There was considerable discussion about the relationship between PBCs and NTRBs in terms of the level of support that NTRBs could and should provide PBCs. Views ranged from providing minimal set up support to developing projects and sourcing funding in partnership with PBCs. Kimberley Land Council representatives James Tapueluelu and Athlea Sullivan led discussion about the current support provided by or requested of NTRBs. KLC region currently has 4 PBCs and a further 2 in the establishment phase (see Table 3 below). The region also has some of the largest future acts and ILUAs agreements in the country including those that have been negotiated with established PBCs.

Determination	PBC	Structure
<i>Rubibi Community v State of Western Australia (2001) FCA 1153</i>	Kunin (Native Title) Aboriginal Corporation	Trustee
<i>Nangkiriny v State of Western Australia [2002] FCA 660 (12 February 2002) and Nangkiriny v State of Western Australia [2004] FCA 1156 (8 September 2004); John Dudu Nangkiriny & Others on behalf of the Karajarri people v The state of Western Australia</i>	Karajarri Traditional Lands Association	Trustee
<i>Attorney-General of the Northern Territory v Ward [2003] FCAFC 283</i>	Miriuwung and Gajerrong #1 (Native Title Prescribed Body Corporate) Aboriginal Corporation	Agent
<i>Ben Ward, Kim Aldux, Frank Chulun, Sheba Dignari & Ors v State of Western Australia & Ors [2006] FCA 1848</i>	Miriuwung Gajerrong # 4 (Native Title Prescribed Body Corporate) Aboriginal Corporation	Trustee
<i>Neowarra v State of Western Australia [2004] FCA 1092</i>	Wanjina-Wunggurr (Native Title Aboriginal Corporation)	Trustee
<i>Palmer Gordon Ngarpil & Others v The Premier & State of Western Australia & Others [2001] FCA 1140</i>	Tjurabalan Native Title Land Aboriginal Corporation	Trustee

Table 3 PBCs in the Kimberley area

5.1 Dependency Interdependency and Independence: The future of the NTRB/PBC relationship

Participants acknowledged that the relationship between PBCs and NTRBs is complicated. They described it as one of interdependency, varying according to the resources and expertise of NTRBs and their capacity to operate effectively and efficiently in a regional context. The native title claim process can in many instances give rise to expectations of relationships of ongoing commitment and of mutual loyalty that extends beyond a determination. Conversely, personal and political issues, the history of the claim or simply the desire of the native title holders to develop independence and exert authority in the management of native title, could give rise to greater separation between NTRBs and PBCs.

PBC desire for independence often has to be tempered against the relative capacity of NTRBs, including the range of support services, expertise and infrastructure that NTRBs have been built up over a number of years and the benefits and economies of scale enjoyed by a regional organisation. Even with the advantages of scale and longevity, NTRBs themselves have long been recognised as struggling to build or maintain. Participants argued that NTRBs are constrained by their capacity because of the difficulties in attracting and retaining qualified staff, extraordinary workloads and harsh prioritisation and inadequate funding. It has also been argued that the recommendations of the PBC Report will put further strain on existing capacity.¹²

Most PBCs lack the resources, expertise and capacity to negotiate substantial agreements. Consultants from the private sector are often required to assist PBCs to reach the most beneficial outcomes and negotiations are often reliant on resourcing by the proponent. Dependency in the other party to a negotiation for funds and advice is fraught with risk, both in the advice regarding a particular negotiation but also the broader integration and coordination of advice and activities. NTRBs can play an important role in benchmarking agreement outcomes. There is also a broader issue around access to information resources and networks for PBCs to ensure more efficient use of scarce resources. PBCs need to be able to take advantage of the experience of others, to inform expectations, processes and content of agreements and the realisation of other aspirations.

Engaging externally with other parties, especially in the process of negotiating memorandums of understanding and ILUAs, can often be a daunting task for PBCs that have limited experience and expertise. Processes of engagement are often initiated by proponents rather than the PBCs themselves.

The emergence of a PBC sector raises questions as to the 'life span' of NTRBs and their future design and functions. Whilst it is recognised that PBCs require assistance when they are initially established as well as

¹² Richard Potok, *A Report into the Professional Development Needs of NTRB Lawyers* (2005).

through the early stages of the establishment of a new 'sector' of organisations. It is unclear how assistance will be provided and how the relationships between NTRBs and PBCs should be defined over time.

5.2 Support needed by PBCs

Many PBCs require assistance on a basic level for example, in managing funding submissions and reporting. The support which NTRBs provide to PBCs ranges from practical and financial resources, logistical assistance, the lending of facilities and equipment through to the provision of legal and anthropological expertise. Kimberley Land Council (KLC) representatives, James Tapueluelu and Athlea Sullivan, noted that the KLC works in close partnership with native title holders and traditional owners as an essential part of its work on claim negotiations, Future Acts, resource agreements and heritage protection issues. Although the management of such issues is the responsibility of the PBC once it is up and running, the KLC continues to have a relationship with PBCs assisting with the negotiation of future act agreements and through its Land and Sea Unit which is responsible for developing and sourcing funding partnerships for on country projects, such as eco-tourism, sustainable land management, supporting mining agreements and research, noting that PBCs can presently access assistance from NTRBs for future act agreements.

Most NTRBs are focused on the native title claims process. Many NTRBs do not have the complement of skills to meet the needs of PBCs in a post determination environment, such as land management, tax, trust and small business advice as well as basic financial and claims services. One proposal was for a dedicated PBC support service to be established in order to assist all PBCs through capacity building and providing expert advice. The support service could also enable the pooling of resources and promote opportunities for communication and networking. However, there is a risk that a third order of organisations may lead to an increase in competition for scarce resources (including qualified staff) within the native title system.

Participants generally considered that NTRBs should be better resourced to assist PBCs in both predetermination and post determination processes. Information and resources should be developed to enable NTRBs to refer tasks and functions beyond their means to other agencies or bodies. Some participants suggested that, where native title holders are referred to other services, some monitoring and follow up should occur to gauge whether they are receiving the support they need.

There is a risk of confusion as to the mandate of NTRBs in providing guidance and support to PBCs in issues surrounding representation. Currently, PBCs rely to a large extent on NTRBs in representing and advocating for their needs at local, regional and national levels. NTRBs have established a national voice and coordination through the newly established National Native Title Council, acknowledging that they do not adequately share knowledge and resources and are at a disadvantage when compared to other actors in the sector.

Some examples of the kinds of support required by PBCs includes logistical assistance, representation, use of facilities especially for communication, organising meetings, administrative, submission writing, agreement-making assistance including negotiation and co-ordination with other agencies. Figure 1 below gives examples of the kinds of support that PBCs may requires in their development.

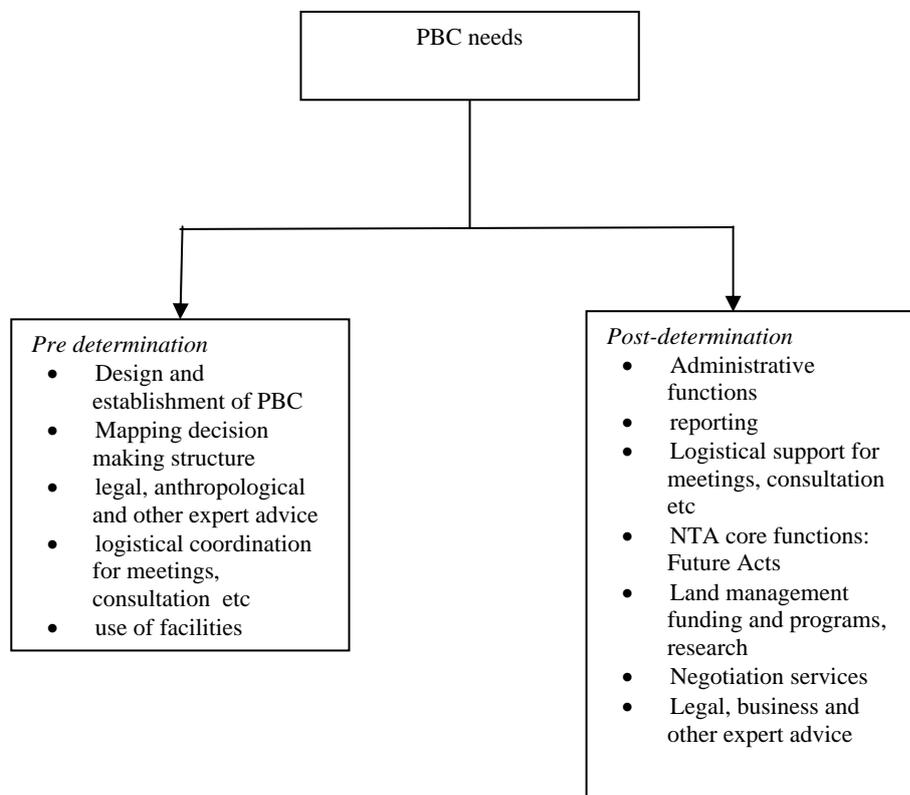


Figure 1 Examples of needs of PBCs during pre and post determination.

5.3 Funding and transparency

Some participants raised questions as to the wisdom of channelling funding through the NTRB, which could undermine principles of autonomy and self reliance for PBCs. From a system design perspective, a long term transition from top-down service-beneficiary to bottom-up service-purchaser may be underpinned by a funding model that reinforces a relationship of dependence on the NTRB.

There were concerns that the proposed funding reforms will merely reshuffle resources within the NTRB system, ultimately placing NTRBs under a greater burden to provide assistance and support to PBCs, while maintaining existing claim work, further without funding or investment in greater capacity. Moreover, the proposed role for NTRBs in administering funds to PBCs would mean that NTRBs will be required to account not only for themselves but also for the actions of PBCs.

It was argued that giving NTRBS the primary role in deciding on funding for PBCs will create perceptions of NTRBs as ‘funding bodies’ or

‘accountability police’, rather than the Government accepting its responsibilities in this area. NTRBs could override PBC objectives and act as gatekeepers of key resources in the native title system such as the services provided by lawyers and anthropologists, should they prioritise the needs of PBCs according to their own priorities.¹³

Any new policies promising funding and greater support to PBCs through NTRBs will increase the expectations of PBCs, particularly directed to NTRBs. Expectations will need to be matched by an increase in NTRB resources and capacity. The reforms have the potential to shift priorities within the NTRB away from an emphasis on claims processes and agreements, similarly affecting the expectations of claimant groups. These changes create a strong need for clear, reviewable and transparent policies for determining when support can and will be provided and for what purpose.

6 PBC roles and aspirations

In order to map the current resourcing needs of PBCs, it is important to identify and understand the roles and aspirations of particular PBCs. Discussion was led by TSRA representative, Meg Lethbrige who is currently undertaking a research project with Torres Strait PBCs to investigate these issues. While it is intended that the question of PBC roles and aspirations will be addressed in more detail with PBCs in further workshops planned by the NTRU, the participants were asked to consider their experiences to date. This critical reflection by NTRBs is necessary to ensure that resourcing and system design questions at a policy and operational level

6.1 Native Title Prescribed Bodies Corporate Capacity Building Project Torres Strait Regional Authority (TSRA)

Currently, the Torres Strait has the most PBCs in any region in Australia with 24 that have been registered and a further seven in the process of registration.¹⁴ The lack of funding for PBCs is a significant challenge for the Torres Strait Regional Authority (TSRA), and a frustration for PBCs who desire independence but seek assistance not only for administrative support and meetings, but also for core functions such as the negotiation of agreements, managing Future Acts and mediation of relationships with other bodies, particularly the 16 Island Community Councils. PBCs aspirations and capacity are thus a significant issue as the Native Title Office of the TSRA moves towards a post determination role.

The TSRA’s Land & Sea Management Unit is coordinating the implementation of the Land & Sea Management Strategy for Torres Strait

¹³ The PBC Report has sought to overcome this by formalising the prioritization of PBCs in funding agreements.

¹⁴ PBCs in the Torres Strait include both Island communities and uninhabited Islands, which often involve shared interests between a number of Island communities. The Torres Strait communities have lodged a joint regional sea claim.

with funding obtained under the Natural Heritage Trust (NHT) and National Landcare Programme (NLP) as well as from other government and non-government funding sources. One of its key projects is the Native Title Prescribed Bodies Corporate Capacity Building Project. Meg Lethbridge from the TSRA gave a short presentation about the Project describing the research conducted to identify the capacity building needs of the PBCs in its region.

The Native Title Prescribed Bodies Corporate Capacity Building Project is a pilot project and aims to build the capacity of PBCs to carry out the functions currently performed by the Native Title Office of the TSRA. The first phase of the project aims to identify challenges, strengths and training and capacity building needs of Torres Strait PBCs. The second phase of the project will be focused on recruiting external expertise to deliver training and capacity programs for the PBCs. The project hopes to resolve the frustration of PBCs who are dependent on the TSRA as well as to relieve the strain on TSRA resources in supporting PBCs.

The project involves four PBCs, two of which are for permanently settled islands and two are for uninhabited islands. The specific aims of the project include:

- identifying the key challenges of PBCs;
- understanding how these challenges hinder the operations of PBCs;
- highlighting the strengths of the membership of PBCs;
- exploring the issues that PBCs want to prioritise for training and development; and
- identifying what PBCs perceive to be the best strategies to address development and training needs.

The initial stage of the project was conducted through three research workshops. Two day research workshops were carried out with the PBCs of inhabited islands and a third was conducted for the cluster of uninhabited islands.

Organising the workshops illustrated, in the first instance, the logistical difficulties faced by the PBCs. For example, reaching a consensus as to where best to meet was a time consuming and complicated issue, as was dealing with travel expenses particularly since most PBCs have little infrastructure and travel to meetings necessitates travel between islands.

The workshops involved a combination of informal discussions and brainstorming aimed at answering a series of set questions through which research issues were explored. The questions covered a number of issues that were practical (such as administrative functions) as well as aspirational issues (such as the perceived role of the PBCs in the future development of the region). Research questions included:

- What do the PBCs members see as their role in a PBC?
- What are the main tasks undertaken by the PBC?
- Who within the PBC is responsible for the main tasks?

- What are the main strengths of PBCs?
- What areas do the PBCs want to become stronger in?
- Does the PBC work in partnership with Island Councils?
- Is the relationship between PBCs and Island Councils effective?
- Has the PBC been involved in negotiations for development with project proponents?
- What types of projects require negotiation?
- What training initiatives will be useful to the PBC?

The findings of the TSRA project so far suggest that PBCs are not satisfied with their current operational and governance capacity and that their goals and aspirations often exceed their capacity to achieve them. While PBCs members understood the roles and responsibilities of PBCs, they did not necessarily have the human capital and individual capabilities to exercise those roles. It is clear though, that PBCs in the Torres Strait region want to have a key role in natural resource management as well as in achieving economic development.

In the Torres Strait, the effectiveness of PBCs in achieving these objectives is often contingent on the relationship that they have with Island Councils. Key issues such as land management and infrastructure development require ongoing negotiation. On permanently settled islands, if there is an effective working relationship, then facilities are often made available to PBCs by the Councils, improving their effectiveness and capacity. In some instances, PBC executive members are also members of an Island Council which can mean a greater understanding of the operations of both bodies and shared access to facilities of the Council. The benefit of such supportive partnerships may translate to other regions on the mainland

6.2 Goals of PBCs and the aspirations of the native title group

Workshop participants were asked to reflect upon their experiences to date with native title holders articulating the goals and aspirations in their regions and how these map onto the perceived roles and functions of PBCs. The goals and aspirations of native title groups can be divided into two broad categories: those which are native title specific, that is, prescribed functions under the NTA, and those that are more holistic and aimed at broader self reliant governance, community development and service provision issues such as health, housing and education. In many instances, however, it is difficult to separate the two, since ILUAs, for example, may involve social issues and land management issues arising out of Future Acts and other agreements are often ongoing. Many Indigenous people also conceive of land and native title in a holistic landscape, within which emotional health and well being are directly related to land and traditional ownership responsibilities.

There was significant discussion amongst workshop participants about the appropriate role for PBCs in meeting these broader aspirations. Understanding these aspirations is imperative in designing the PBC and related infrastructure. It is also instrumental in the design of future PBC support infrastructure within the NTRB. Careful design can enable a proactive approach to resourcing and development that is targeted to the long term priorities of the native title group.

The NTA and the PBC regulations set out the functions that need to be carried out by PBCs. There are also corporate governance obligations as well as other State or Territory legislation. (These are attached in Appendix 2). However, the functions that specifically arise out of the NTA are not easily divorced from a range of other PBC goals. The recognition of native title broadly, under the common law and the NTA, and more specifically, when a successful determination is made, have increased the authority of the traditional owners to 'speak for country' in a variety of ways.

Neither is it only native title holders who have broader expectations of their PBC than is signalled under the NTA. Native title determinations establish 'legitimised' cultural boundaries of groups. The PBCs who represent native title holders provide a ready-made corporate representative entity with which State Governments or development proponents, can engage around a range of issues including issues that may not be seen as directly native title related, or involving areas where formal native title rights and interests have not been granted. That is, as the broader aspirations of native title groups can be reflected in the expectations of external parties.

Some PBC aspirations which were identified at the workshop involve:

- natural resource management;
- land acquisition (eg Indigenous Land Corporation, joint management);
- economic and business development;
- local governance;
- recognition and signage;
- maintaining and strengthening cultural heritage (eg through the curriculum of local schools or site management) ;
- keeping places;
- health;
- housing;
- caring for country and conservation;
- attracting employment, education and training opportunities; and
- facilitating access (eg through licenses, permits and ranger programs).

Native title holder involvement in the PBC is almost universally in a volunteer capacity, unpaid and part time. While some PBCs have received

small amounts of compensation for Future Acts, this has been limited. Where available, resources may be used to employ consultants to develop plans and strategies but, even in such instances, there may be limited of capacity to implement them.

Native title holders expect to represent their interests in a range of ways and the PBC may be seen as the only vehicle to meet their aspirations. The specific and sometimes limited rights and interests which are identified in a determination, or the limited functions set out in the PBCs rules, may not necessarily be the key factor in determining the role and scope of the PBC as native title is used as a mechanism to achieve other goals. The primary concern, as discussed earlier, about PBCs taking on roles beyond those which some may see as strictly native title related, is the risk associated with overstretching the PBC and making it vulnerable to failure. However, separating the native title group's identity from the PBC as a limited landholding organisation may be conceptually and practically difficult.

Many participants felt that it was prudent to allocate specific functions to special purpose organisations, without a proliferation of corporate structures placing a strain on limited resources. This view holds that the PBC will not be the only vehicle to deliver the aspirations of the native title holding group. Greater investment in the early stages of the PBCs evolution, careful and efficient planning, design and co-ordination and greater awareness among program delivery agencies and other potential partners can assist PBCs in ensuring that rights, interests and needs are realised.

7 Future directions

7.1 Research

In order to understand the current and future needs of PBCs, a significant amount of research is required in order to understand the current operating context and to identify how PBC needs can be best addressed. Some of the key issues that require further investigation include:

- What are the aspirations of PBCs? How can practical pathways and mapping options be used to achieve them? How is success defined for PBCs and how can best practice principles be developed?
- What kind of capacity exists in/is required by PBCs and how can existing capacity be identified and built upon?
- What are the corporate structures that surround native title holders and the PBC?
- How are traditional decision making structures treated in the corporate structure of PBCs?
- What are the relationships between PBCs and other local and regional Indigenous organisations and how can the functions of these pre-existing organisations be co-ordinated?
- How do legislative regimes under State enacted land rights legislation affect PBCs?

- What is the potential insurance and negligence exposure for native title holders?
- What should be the relationship between PBCs and NTRBs?
- What are the implications of providing support to PBCs through NTRBs? How will this affect NTRB work loads and priorities? What will be the long term impact on PBC capacity and independence?

7.2 Resources

It was recognised by participants that in such a new area of practice, the lack of resources, coordination and networks is debilitating. It is clear that in this workshop a number of preliminary issues have been identified that will be workshopped with PBCs in the future. However it is anticipated that both NTRBs and PBCs will require accessible, cost effective and culturally appropriate support in terms of:

- Developing a database of existing PBCs and their activities;
- Collecting information on the role, functions and structures of PBCs as templates for use when designing corporate structures;
- Generating tools and resources for cross cultural communication especially in terms of the implications of various models for the design of PBCs;
- Collating information on the funding and resources that are currently available to PBCs from both government and non-public sources; and
- Facilitating opportunities for information sharing between PBCs.
- Mapping the relationship between PBCs and existing corporations and agreements;
- Carrying out a skills assessment and identifying existing expertise;
- Developing partnerships with other government agencies such as the NNTT and ORAC in areas such as managing a corporation, how to apply for appropriate funding, developing templates etc;
- Creating resources for the CATSI transition;
- Sourcing more funding and support for NTRBs in its new proposed role;
- Develop registers of qualified legal, economic, business, financial and other experts that are accessible to PBCs;

Appendix 1: Workshop Participants

List of attendees	
Meg Lethbridge	Torres Strait Regional Authority
Michelle Cohen	Cape York Land Council
John Liston	
Cordell Scaife	
Lisa Castanelli	Carpentaria Land Council Aboriginal Corporation
Lorna Gregory	
Richard O'Shane	North Queensland Land Council
Bernie Beston	Gurang Land Council Aboriginal Corporation
Rhonda Jacobsen	New South Wales Native Title Services
Natalie Rotumah	
Katie O'Bryan	Native Title Services Victoria
Jonathan Kneebone	Northern Land Council
John Hughes	
Austin Sweeney	Central Land Council
Steve Quinn	
Francine McCarthy	
Osker Linde	Aboriginal Legal Rights Movement
Malcolm O'Dell	Ngaanyatjarra Council
Sian Hanrahan	
Wendy Gong	Goldfield Land and Sea Council Aboriginal Corporation
Trevor Donaldson	
Victoria Wetherby	South West Aboriginal Land and Sea Council
Rainer Mathews	Yamatji Bana Baaba Marlpa Land and Sea Council
Athlea Sullivan	Kimberly Land Council
James Tapueluelu	
Greg Roche	Department of Family and Community Services and Indigenous Affairs

Rebecca Bigg-
Wither

Steven Marshall Attorney General's Department

Julia Galluccio

Tony Lee Native Title Consultant

Robert Jansen Lingiari Policy Centre

Lisa Strelein Australian Institute of Aboriginal and Torres Strait Islander
Toni Bauman Studies

Jessica Weir

Lara Wiseman

Tran Tran

Amy Williams

Patrick Sullivan

Appendix 2: PBC Functions and Obligations¹⁵

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
- exercising procedural rights afforded to native title holders under the NTA 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
- 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:

¹⁵ Extracted from Attorney General's Department *Structures and Processes of Prescribed Bodies Corporate* (2006), [4.3] - [4.8].

- 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 ... the corporate governance obligations imposed on PBCs would be modified significantly under the CATSI [Act].

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, as well as under relevant State and Territory legislation and procedures governing heritage issues.