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Comments on PBC Support Strategy – Consultation Paper

Following are comments from the National Native Title Council (NNTC) on the PBC Support Strategy Consultation Paper dated October 2016. These comments are provided in the spirit of our common interest, that of improved PBC support and function and trust they can assist in developing good policy in this direction.

1. Better engagement

Question 1: What is the best way for the Commonwealth to engage with PBCs, now and into the future?

In the main, the best mechanism is to work with the regional networks that have been created over time with Native Title Representative Bodies or Service Providers (NTRBs/NTSPs). NTRBs/NTSPs have been developing support mechanisms for and with PBCs for some years and this regional mechanism now provides large scale access to PBCs.

It must be noted that while some PBCs have significant resources in their own right and seek only support services from their respective NTRB/NTSP (such as accounting, legal etc), many do not have this capacity and place heavy reliance on their respective NTRB/NTSP for a deeper level of support. Irrespective of the level of service required though, the fact remains that the regional network provided by NTRBs/NTSPs is the most efficient and effective way of engaging with the majority of PBCs.

As a note on efficient mechanisms, the act of engaging with PBCs from external parties can take considerable time away from PBC core business even though many of these external efforts have positive intentions. As such, balancing demands for engagement and core functions can be difficult and external parties can become frustrated with delays or being removed from agendas. Additionally external parties don't have a relationship of trust with PBCs, which can take significant time, effort and resources to develop.

This underscores the need to work with regional networks that have an existing trust relationship and can short circuit the longer processes required when starting from scratch. Additionally, the regional NTRB/NTSP network can shoulder much of the administrative burden of engagement from the PBCs thereby saving PBC resources and providing more freedom to PBCs to conduct their core business.

The NNTC is aware that this approach often leads to allegations of gatekeeping on the part of NTRBs/NTSPs. The NNTC puts forward that this is most often levelled by those with little knowledge of the dynamics at play or pressures on the PBCs themselves or in some cases, those with less than honourable motivations.

Despite allegations like this that surface from time to time, the regional network provided by NTRBs/NTSPs remains the most effective and efficient way through which to engage with the majority of PBCs and provides the most freedom for PBCs to make decisions on their core business. This doesn't take away from independent PBC decision making and operation, rather it reflects an evolving service delivery arrangement designed to enhance decision making and reduce operational burdens for PBCs.

It's also understood that a number of PBCs prefer not to receive any form of service from NTRBs/NTSPs, although the NNTC puts forward that the number of organisations in this category can be overstated. As in previous comments, some of these PBCs have substantial resources and will have systems and capacity to be able to engage at a direct level. Where this is the case, there is no reason why direct engagement cannot and should not occur, although results may be less predictable depending on the sources of advice.

Other PBCs in this category have little to no resources and therefore have no capacity to engage administrative, governance, legal and other support. These PBCs are very vulnerable and are a major concern for NTRBs/NTSPs. Examples have already emerged where external parties have negotiated poor outcomes in exchange for money, with the poor outcome accepted due to resource scarcity. Sadly, benefits in these examples are ephemeral and lead to dispossession.

For this latter group, engagement remains difficult as does the provision of resources due to a lack of capacity and systems to manage these resources. In cases such as these and although it may be unpalatable for some, the regional network provided via NTRBs/NTSPs remains the best option for engagement in order to reduce the burden on non-resourced PBCs.

2. More effective, transparent, coordinated funding

Question 2: Is current PBC funding reaching those PBCs that need support to maximise available opportunities for economic development and partnerships, within the context of the aspirations of the native title holder group? How can more PBCs take advantage of the existing funding opportunities?

Question 3: What are your views of these proposed changes to funding arrangements?

Question 4: How do PBCs want to get information about funding related changes in the future?

Question 5: What are the current support services available to PBCs? How can this be better coordinated?

In the main, these questions are best addressed by NTRBs/NTSPs who provide services directly to PBCs, however the NNTC provides the following general comment on text within the Consultation Paper:

- Enable PBCs, or an NTRB/SP or other provider authorised on their behalf, to apply for basic support funding.

From an NNTC point of view, all PBCs would ideally have the ability to apply for basic support funding themselves. That being said and as discussed previously, a large number of PBCs rely upon assistance from external parties such as NTRBs/NTSPs and in some cases, private providers, which they are free to enter into at their own discretion.

In the same way a PBC is free to engage with external service providers, if PBCs have arrangements with service providers, these PBCs should be free to authorize their service providers to apply for funds on their behalf. This may result in arrangements where the service provider also manage funds (ie banking), a result that is not uncommon in other not for profit sectors, so is an arrangement that should be accepted as appropriate where consented to by the PBC.

The NNTC has been provided with anecdotal information that those PBCs who seek NTRBs/NTSPs to apply on their behalf have been less successful than those who have authorized private agents. If this is the case, this is a perverse outcome that undermines the ability of PBCs to exercise their own discretion as to who they seek services from and needs to be reversed.

It must be noted that NTRB/NTSP providers will be more cost effective due to the need to only charge services at a cost recovery basis, where these services aren't already supported by Commonwealth funds. Private providers on the other hand, can and will charge up to

\$500 per hour or more, which will see the majority of basic support funds spent on these charges rather than PBC support. This type of arrangement is therefore uneconomic and inefficient.

- Remove the previous unofficial caps on basic support funding

The NNTC agrees with this point.

- More effectively target PBC funding by enabling PMC or its representative to directly approach PBCs to negotiate the delivery of activities or a service. This could occur where PMC identifies that there is an unmet need to support a PBC or PBCs to increase their capacity to take advantage of economic opportunities and build long-term organisational capacity.

The NNTC doesn't necessarily agree that PMC or a representative directly approaching a PBC will lead to more effective engagement for the reasons outlined previously and is of the view that PMC needs to use the existing regional network.

At a practical level, NTRBs/NTSPs have hundreds of staff spread across the country where as PMC has very few. As such, it's unlikely PMC will have the capacity to engage in an extensive direct engagement approach. Engaging third parties will have the same pressure, with the added disadvantage of being expensive and less cost effective.

Where PMC believe there is unmet need, it would be more efficient to raise and discuss this with the relevant regional NTRB/NTSP and to develop an approach. It's likely that whatever the circumstance, a level of briefing, an introduction, the facilitation of a meeting etc will need to be provided by the NTRB/NTSP in any case. Making direct approaches without understanding the particular circumstances that exist can create inadvertent negative outcomes or worse, can result in PBCs being exploited, both of which are major concerns for NTRBs/NTSPs.

Again, where a PBC has its own independent service providers, there may be the capacity to do this, however in a situation where there is little or no capacity and no pre-existing relationship with the PBC, a direct approach from PMC or an agent would have difficulty gaining traction and most likely require NTRB/NTSP intervention or assistance at some point.

- Use current resources to support PBCs beyond direct funding, including through sector-facilitated training.

At this point, it's likely that the direct funding (maintained at the current resource level at least) will need to be entirely applied to maintain basic support for Directors meetings, AGMs, native title decision making and accounts – in other words the basic core business

and function of PBCs. As such, it is the view of the NNTC that funding support for initiatives such as training or other capacity building support should be resourced from other Commonwealth funding sources.

- Simplify application processes where possible.

The NNTC agrees that the application process should be as simple as possible. There are in fact funding processes whereby an organization can apply for vast amounts more funds than are available in this instance, with much simpler funding applications. The PBC support funding program would do well to emulate this and simplify the application process to a level commensurate with the relatively small amount of funds being provided.

- Ensure delegations are more appropriately linked to funding decisions.

The NNTC is of the view that there can be no good reason for requiring Ministerial approval for grants as small as \$50,000, it's a level of micromanagement that is inappropriate, inefficient and one the NNTC suspects allows for political rather than practical considerations to unduly influence decision making.

Across the Commonwealth public service, it's likely there are individual public servants working at APS levels 5 and 6 who have spending delegations up towards \$50K, let alone officers who operate at Executive or SES levels. To be honest, and even putting aside early comments about political motivation, it seems nonsensical that such small amounts of money would not be delegated to even state level PMC officers, if for nothing else than efficiency and timeliness.

In short, the NNTC agrees that delegations should be more appropriately linked to funding decisions.

- Provide greater transparency and clarity about the use of PBC funding.

The NNTC agrees that transparency and clarity on the use of PBC funding is necessary, both for PBCs, NTRBs, NTSPs and Government. Further, while transparency and accountability are important, given the small amounts of money that are being provided to organisations, the levels or transparency should not be overly burdensome (and thereby require use of significant portions of the funding) and set at a level appropriate to the level of funding provided.

- Better coordination of available Commonwealth and State government funding.

The NNTC agrees that improved co-ordination of funding would be positive for the sector, given the ability of other types of funding to develop PBC capacity and activity or their reliance on basic PBC support funds and the activities it generates to succeed.

Coordinating with State based funding may be difficult given the propensity of States to cost shift to the Commonwealth, however it remains a goal worth pursuing.

3. Other support

Question 6: Are PBCs interested in participating in these kinds of projects?

Question 7: Is there interest in funding for this purpose? How can it be prioritised?

As a general comment, PBCs do express a desire to receive other support and become involved in other types of activities. At a basic level, current PBC support allows Directors to meet, for AGMs to occur and for native title decision making, however there is a need for strategic planning and direction setting as one of the building blocks of PBC development.

NNTC is of the understanding that NTRBs and NTSPs provide assistance for this planning for the many PBCs who seek services from them and this provides an excellent platform from which to develop. Others who seek more independence struggle to cross even this most fundamental of hurdles and become frustrated with the system at large, although there exists a network that is willing to assist them.

As a note, the task of making native title decisions is often an onerous one, particularly in remote areas due to the logistics involved to consult properly. Any support for enhancing native title decision making would be welcomed, however this should probably be factored into normal PBC support funding rather than being seen as a further type of support. Alternatively, user pays system should be accepted.

As a further note, there is an argument that says PBCs should focus solely and entirely on native title decisions and that other projects should not be entertained as they reduce the attention paid to these core native title matters. Others counter argue that projects such as Indigenous Protected Areas, Ranger programs and other community development initiatives sit within the natural business of a PBC as expressions of native title and therefore should be encouraged and undertaken.

These opposing views aren't necessarily settled at this point, and certainly the approach differs from region to region. What is evident however is that traditional owner groups do wish to undertake a broader range of activities and whether this is through a PBC or via another instrument of the group is left to the group itself.

It does appear though, that other types of projects such as those mentioned can play a strong role in PBC development. As is mentioned in the Consultation Paper, there is a need to gather more information on the circumstances in which is the case, which the NNTC is strongly supportive of.

4. Minor legislative and institutional role reform

This section of the Consultation Paper, while brief, actually inquires into a set of issues which are complex and probably worthy of further consideration in an additional forum. In saying this, there is likely to be a need to refine PBC regulations, however the NNTC is hesitant to engage too deeply in that discussion without further consideration. Keeping this in mind, the NNTC offers the following comments.

Question 8: Would a system of low cost and final dispute resolution between members of the native title group and the PBC lead to earlier consideration and potentially resolution of disputes?

Without fully understanding what form a proposal might take, on the surface the idea of a low cost dispute resolution process is one that is attractive. The idea of a final process is probably unrealistic however, as any and all conflicts can reach arbitration and if they do, are arbitrated by the Courts. This may not seem ideal, however any law enacted that prevents peoples access to a Court would be unlikely to survive.

Perhaps a better pathway is to integrate the dispute resolution functions of NTRBs/NTSPs, to escalate to the National Native Title Tribunal if that isn't successful for mediation/arbitration, after which aggrieved parties would be free to access the courts.

There has been a suggestion that the Office of the Registrar of Indigenous Corporations (ORIC) could be a vehicle for dispute resolution in native title matters. This is a very poor idea and one that should be prevented. The reason behind this isn't any ill feeling towards ORIC, rather it is because ORIC has no expertise in native title and to ensure clear delineation between the regulator of corporate matters and the regulators and existing expertise/authorities in native title matters.

As a final comment on this topic, it's common for TOs to be given news that is not satisfactory to them by NTRBs/NTSPs and PBCs. It's also common for some TOs to disagree with decisions that are made via a general consensus of the TO group. In such circumstances these people often forum shop, that is take a complaint to whoever it is that will listen.

In many cases, complaints or disputes such as these are seen as emergency situations that lead to inappropriate intervention. Instead, it needs to be acknowledge that disputes exist, that there is a system for dealing with them and this system starts with mediation and possibly ends in the High Court. Just because a dispute is raised doesn't mean it has arisen from a legitimate complaint and in many cases, they just need to be allowed to play out to expose the appropriate evidence base which will allow a dispute to be finalised.

Question 9: How could the accountability of PBCs to native title holding groups for compliance with the PBC Regulations be improved?

It's likely that where there is a lack of accountability, the PBC Regulations aren't at fault, rather the people who are operating the PBC are. In such cases, as with existing law, it doesn't really matter how prescriptive regulations or law are, if a person or group of people wish to ignore them, then they will.

Further to this, the resources pressure and logistical problems that face PBCs can contribute to decisions not being taken with the proper procedures or due diligence in mind, particularly in those PBCs that have no support network. This can of course then lead to conflict

That being said, there are likely to be areas within the PBC regulations that may be developed to reduce these occurrences that need to be looked at closely, however the NNTC is of the view that this issue needs to be scrutinized at a deeper level.

Question 10: Should the PBC Regulations that relate to the transparency and accountability to native title holders about the use of native title monies also apply to native title monies held outside the PBC?

It's unclear as to what native title monies held outside the PBC fully refers to. If it refers to monies held in trust, there are already mechanisms in place in finance laws that require transparency to beneficiaries and changes to the PBC regulations would be unlikely to compliment this.

In saying this however, there is much to say in relation to native title monies that are held in trust (for example), but this relates to trustees themselves, trust deeds and the manner in which they are drafted and questions around whether trusts are in fact the most effective mechanism for holding and best applying native title monies. This is a separate topic that the NNTC would be happy to engage with PMC on.

If the term 'native title monies held outside the PBC' refers to a different issue, the NNTC would be keen to comment if clarification is able to be provided.

Question 11: Are current mechanisms for streamlined decision-making processes, such as standing authorisations and alternative decision-making processes, being used by PBCs? How can information about these mechanisms and their usefulness be improved?

PBCs routinely engage in mechanisms for alternate decision making, though the manner in which this is done varies. Some PBCs place these mechanisms within their Constitutions where as others prefer to create policy that is then approved by the native title group.

Such mechanisms need to take into account the type of notice received, the magnitude of the project involved, whether there are specific traditional owner regions, authorities or knowledge holders in the area affected by a notice and a number of other things. When these matters are calibrated properly, a clear set of mechanisms can be developed.

In terms of information on these mechanisms, the NNTC, with the consent of NTRBs/NTSPs, can take a sample to assist in developing a knowledge base around them.

5. Concluding Remarks

While brief, the Consultation Paper raises a number of complex issues that need to be unpacked further. Even so, it's the hope of the NNTC that the comments in this correspondence assist in the policy making process and we stand ready to provide further input into future policy development.

If there are any queries about the content of this correspondence, please don't hesitate to contact me at glen.kelly@nntc.com.au.

Yours faithfully,



Glen Kelly
Executive Officer