



Australian Government

**Department of Families, Housing,
Community Services and Indigenous Affairs**

Native Title Program

Guidelines for Basic Support Funding for Prescribed Bodies Corporate (PBCs)

- **Policy and Legislative Framework**
- **Funding Applications**

**Land Programs Branch
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A. Policy and Legislative Framework

1. Introduction

1.1 These Guidelines provide information about basic funding to support the essential day-to-day operations (administrative costs) of mainland Prescribed Bodies Corporate (PBCs) under the Native Title Program. The Guidelines:

- describe the **policy and legislative framework** for providing funding; and
- set out the procedures for making **funding applications** and the **criteria for assessing them**.

(Prescribed Bodies Corporate established in relation to native title rights in the region serviced by the Torres Strait Regional Authority should approach that organisation if they are in need of assistance).

2. Australian Government policy concerning native title

2.1 The Government is actively pursuing a fair, stable and effective native title system that provides for:

- the timely disposition of native title claims;
- high quality agreement making;
- cooperation with stakeholders in the native title system, in particular the states and territories, to implement the Act;
- resolving native title issues through agreement, where possible;
- improved capacity and governance for native title groups; and
- sustainable outcomes for current and future generations.

2.2 These goals are supported by Australian Government resourcing of the native title system to enable effective stakeholder participation.

2.3 FaHCSIA's Native Title Program exists to provide funding support for the network of Native Title Representative Bodies and Service Providers under Part 11 of the Native Title Act 1993. In recent years, as the number of successful determinations of native title has increased, the number of Prescribed Bodies Corporate established to manage determined native title has also increased. Whilst some have access to resources generated through their management of determined native title, others are often faced with a struggle to meet their obligations as PBCs. In the absence of any dedicated source of funding for PBC support, FaHCSIA has in recent years allocated small amounts of funding from within its Native Title Program to provide a source of basic support funding for PBCs that find themselves in difficulty. The level of funding available for this purpose is very limited and there is no guarantee that all critical support needs applied for can be met from this limited source. PBCs are therefore encouraged to explore all available avenues of support.

3. PBC Legislative Framework

3.1 PBCs have a range of functions and obligations including those under:

- the *Native Title Act 1993* (Native Title Act);
- the Native Title (Prescribed Bodies Corporate) Regulations 1999 (PBC Regulations);
- the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (CATSI Act); and
- other Commonwealth, State or Territory legislation.

3.2 The primary roles of PBCs are to:

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

3.3 The Native Title Act recognises that native title rights are primarily group or communal rights and that membership of the title holding group will change over time. In seeking to accommodate native title within the Australian property law regime, the PBC model was adopted to provide a mechanism through which the communal character of native title can be recognised by means of a clearly identified entity that can act for the native title holding group.

PBCs provide the interface between the traditional laws and customs of Indigenous Australians and the land ownership and management systems of the wider Australian community.

3.4 A 2006 inter-departmental Steering Committee report, *Structures and Processes of Prescribed Bodies Corporate* observed that PBCs need to operate effectively so that native title holders can utilise their native title rights to enable them to derive significant economic and other benefits and to discharge their land management obligations.

Native Title Act and PBC Regulations

3.5 The Native Title Act and PBC Regulations give PBCs the following key functions and obligations:

- *managing* the native title holders' native title rights and interests;
- *receiving* future act notices, and advising native title holders about such notices;
- *consulting* with the native title holders about native title decisions;
- *exercising* procedural rights afforded to native title holders including commenting on, objecting to and negotiating about proposed future acts;
- *preparing* submissions to the National Native Title Tribunal (NNTT) or other arbitral bodies about right to negotiate matters;
- *negotiating*, implementing and monitoring native title agreements;
- *considering* compensation matters and bringing native title compensation

- applications in the Federal Court;
- *bringing* revised or further native title determination application cases in the Federal Court;
- *holding* money (including payments received as compensation or otherwise relating to the native title rights and interests) in trust;
- *investing* or otherwise applying money held in trust as directed by the native title holders;
- *preparing* and maintaining documentation as evidence of consultation and consent;
- *consulting* and considering the views of the relevant native title representative body (NTRB) or native title service provider (NTSP) for an area about proposed native title decisions; and
- *performing* any other function relating to the native title rights and interests as directed by the native title holders.

3.6 Regulation 4 of the PBC Regulations provides that an Aboriginal and Torres Strait Islander corporation is prescribed for section 59 of the Native Title Act if it is registered for the purpose of being the subject of a determination made by the Federal Court that it is to hold particular native title on trust, or perform non-trust functions of a PBC in relation to particular native title.

3.7 “Aboriginal and Torres Strait Islander Corporation” is defined in the CATSI Act to mean a corporation registered under the CATSI Act.

3.8 PBCs’ obligations under the CATSI Act include conducting Governing Committee meetings, maintaining a register of members, conducting annual general and special meetings, and keeping accounts and records.

3.9 The CATSI Act distinguishes between ‘small’, ‘medium’ and ‘large’ corporations.¹ It is likely that most PBCs will be classified as small corporations. As such, they will only have to provide a minimum ‘general’ report containing basic corporate details and not including audited financial statements. They may apply to submit this report every second year, rather than annually. Small corporations will also be able to apply to the Registrar of Aboriginal Corporations to hold their annual general meeting every two years.

Functions under other legislation

3.10 PBCs may also have functions or obligations under other Commonwealth, State or Territory legislation. These will vary according to requirements of the legislation, and the nature of the native title rights held. PBCs that manage exclusive native title rights are likely to be subject to a number of land management obligations in the same way as other land owners.

¹ These distinctions are based on gross operating income, consolidated gross assets and number of employees. Details are specified by regulations made under the CATSI Act.

3.11 PBCs may also have cultural heritage functions to perform under State and Territory legislation. Funding for the performance of these functions should be sourced from the responsible State/Territory agencies.

Community expectations

3.12 PBCs may also be expected to fulfil broader roles with respect to Indigenous issues. For example, they may be asked to become involved in activities such as town-planning, social harmony projects, cultural protocols, welcomes to country and interpretive and cultural signage, and economic development.

4. Policy framework for PBC funding

Background

4.1 Under previous funding arrangements NTRBs/NTSPs could apply to use Native Title Program funds to assist with establishing, incorporating and registering a PBC *up to and including* its first annual general meeting. NTRBs/NTSPs can also use these funds to perform the statutory functions of an NTRB in relation to a PBC *at any time* (for example, by assisting PBCs to negotiate future act agreements). Where necessary, this includes assisting PBCs to perform their statutory functions (for example, in assisting a PBC to negotiate a future act agreement, an NTRB/NTSP could fund a meeting at which the PBC consults with and seeks consent from the native title holders before making a decision to agree to the future act).²

4.2 The lack of funding for PBC administrative costs was a matter of on-going concern to stakeholders including PBCs themselves, NTRBs/NTSPs, industry bodies and governments. The *Report on the Operation of Native Title Representative Bodies* by the former Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Account (March 2006) recommended that the Commonwealth examine appropriate means for resourcing the core responsibilities of PBCs.

4.3 The 2006 inter-departmental Steering Committee report, *Structures and Processes of Prescribed Bodies Corporate* recommended funding PBCs for their administrative costs through NTRBs/NTSPs (while noting that assistance should not necessarily be provided through NTRBs/NTSPs in every case). The then Government subsequently accepted the recommendations in this report.³ It was also recognised that there may, in exceptional circumstances, be a case for providing support funding to some PBCs direct.

4.4 Consequently, NTRBs/NTSPs and PBCs may now apply for Native Title Program funding, and these Guidelines set out the procedures for that process.

Need for funding and availability of funding from other sources

² FaHCSIA wrote to NTRBs in January 2006 to restate its position on this issue.

³ See the Hon Mal Brough MP, "Reforms to Improve Management of Native Title Rights", Joint Media Release with the Hon Philip Ruddock MP, Attorney-General, 27 October 2006

4.5 It is clear that some PBCs will require a level of external support to meet their basic obligations and carry out their functions. However, the needs of PBCs will vary considerably, based on considerations such as:

- geographical location (remoteness);
- the nature and extent of native title rights and interests held;
- the level of native title activity;
- the nature of the relevant group of native title holders;
- the complexity of consultation and decision making processes; and
- the level/volume and type of future act activity in the PBC's area, which would impact on whether and to what extent funding may be sourced from industry.

4.6 Except in exceptional circumstances, basic funding for a PBC's critical administrative needs under the Native Title Program shall not exceed \$100,000 in any financial year.

4.7 The Native Title Program should not be considered a first stop for funding. Funding should be sought as appropriate from State and Territory governments and agencies, industry, and other relevant Australian Government departments and agencies.⁴

4.8 Applicants should be aware that there is no guarantee that funding will be provided under the Native Title Program, or that funding will be provided to the extent sought.

5. Portfolio responsibility

5.1 The Minister for Families, Housing, Community Services and Indigenous Affairs has portfolio responsibility for the PBC provisions in the Native Title Act.

5.2 FaHCSIA administers the Native Title Program and can be contacted at:

Manager
Land Programs Branch
Department of Families, Housing, Community Services and
Indigenous Affairs
Box 7576
Canberra Business Centre ACT 2610

www.FaHCSIA.gov.au

⁴ The Australian Institute of Aboriginal and Torres Strait Islander Studies has published a Toolkit on potential funding sources for PBCs on its website (www.ntru.aiatsis.gov.au).

B. Funding – General

1. Introduction

1.1 Funding available under the Native Title Program is limited and therefore there is a need to consider applications equitably and against competing priorities. Consequently, all applicants/potential future applicants seeking financial support for a PBCs administrative costs may not be funded to the level sought.

1.2. Basic support funding agreed for a PBC will be provided to the NTRB/NTSP for the area in which the PBC is located (see Part C - Applications from NTRBs/NTSPs) for the following reasons:

- significantly lower transaction costs for all parties, which avoids duplication of effort;
- NTRBs’/NTSPs’ experience and expertise in administering Native Title Program funds including preparing funding submissions, meeting reporting requirements and accounting for funds;
- NTRBs’/NTSPs’ on-going functions to assist PBCs in relation to native title rights, for example, with future act negotiations; and
- a constructive partnership between the PBC and the NTRB/NTSP will generally facilitate positive outcomes over time for the native title holders.

1.3. PBC applications for basic support funding should be provided by the PBC to the NTRB/NTSP for the area in which the PBC is located by a date to be advised.

1.4. The NTRB/NTSP will provide to FaHCSIA, by given deadlines:-

- i. a copy of all applications received from PBCs in their region;
- ii. documentation assessing and commenting on the PBC’s claims and the critical nature of funding sought, including the consequences of not providing the assistance sought; and
- iii. an overall assessment of relative needs across PBCs in the NTRB/NTSP region, with recommendations for funding.

2. Funding Assessment Process

2.1 Criteria:

Funding applications will be assessed against the following criteria:

(a) Whether the organisation seeking assistance is eligible

Funding can only be provided for PBCs. This would exclude, for example, ‘related’ corporations established to carry out business activities.

(b) Whether funding for PBCs’ administrative costs has been sought or received from other sources, or whether there are other sources of funds available to, or held by or on behalf of the group represented by the PBC

which might be used for the purpose.

(i) To ensure that the Native Title Program is not regarded as a first port of call for funding assistance, and that there is no duplication of funding, FaHCSIA when assessing an application for PBC funding against this criterion, will consider whether:

- a) there are alternative sources of funding available for the activity proposed;
- b) the PBC has secured such funding, and the amount involved; and
- c) there is a need for further funding under the Native Title Program.

(ii) Applicants should therefore indicate

(a) whether funding for administrative costs has been sought/received from:

- State or Territory Government departments or agencies;
- local government authorities;
- Australian Government departments or agencies (other than the Portfolio Governance Branch of FaHCSIA); and/or
- private sector entities (for example, companies proposing to carry out future acts on native title lands); and

(b) . whether there are other sources of funds available to, or held by or on behalf of the group represented by the PBC, which might be used for the purpose.

(iii) Details of funding for administrative costs sought/received should be provided to FaHCSIA. Where funding sought from an alternative source has been declined, the applicant should include an explanation on the circumstances or the reasons why funding was declined.

(iv) Applications which do not provide clear information and evidence of funding sought and received from other sources, or available to the group represented by the PBC, will not be considered for assistance.

(c) Critical Need – and Items eligible for funding as administrative costs.

The prime initial consideration in determining priorities for the allocation of PBC basic support funding **will be the extent to which the need identified is critical to the survival of the organisation.**

As to the types of costs that may be supported, the following is a non-exhaustive list of items that may be funded as administrative costs. Funding may also be sought for additional items, in which case FaHCSIA will decide whether the item is an administrative cost (and may therefore be funded).

- lease of office premises;
- cost of insurances and financial services (including bank fees and charges);
- costs to meet regulatory compliance obligations, for example, annual general meetings, special general meetings, Governing Committee meetings, and preparation of regulatory reports;
- assistance with preparing funding applications to other agencies;

- assistance with book-keeping and auditing;
- strategic and tactical planning activities;
- cost of obtaining accounting, financial planning or investment advice;
- cost of communications facilities, for example, telephone, fax or email;
- utility costs, for example, power, water, sewerage, telephone and internet accounts;
- expenses associated with administrative facilities for the production and copying of documents (including information technology facilities and support, paper and stationery);
- cost of facilities for storage of records relating to PBC functions; and
- in limited circumstances assistance to cover costs associated with employing office staff (see notes 6 and 7 below).

Notes on eligible items:

1. Governance training and capacity building costs will not generally be met from the Native Title Program. The Office of the Registrar of Indigenous Corporations has programs that can assist with these matters.
2. Governance training may be funded, but only if ORIC is unable to provide assistance.
3. Information on the Office of the Registrar of Indigenous Corporations can be found at <http://www.oric.gov.au/>
4. Travel expenses to and from training may be considered for funding eg., travel expenses for governance training may be funded.
5. Meeting costs should, as far as possible, be kept to a minimum appropriate to the circumstances, for example, by using telephone hook-ups if this is feasible.
6. Because of the potential significant costs associated with the employment of office staff by PBCs, it will be necessary for applicants to demonstrate that:
 - there is a real and on-going need;
 - other avenues to fund staff have been explored;
 - staffing costs have been kept to a minimum; and
 - skilled and experienced staff are available. FaHCSIA recognises that in some cases it may not be possible to engage skilled and/or experienced office staff before availability of funding is approved. In such cases, funding may be agreed in principle, subject to successful recruitment action.
7. Where funding is approved to engage staff, funds for this purpose will not be released until confirmation of adequate insurance

coverage for workers compensation and public liability and, where appropriate, professional indemnity insurance is provided to FaHCSIA.

8. Fees for interpreter services may be considered on a case by case basis.

(d) Keeping costs of reporting and meeting obligations at a minimum appropriate to particular circumstances

Requests for funding to comply with CATSI Act obligations should show that advantage has been taken of lower reporting requirements that may be available under the CATSI Act to reduce costs, or set out the reasons why lower reporting requirements are considered inappropriate.

(e) Risk assessment

(i) FaHCSIA will assess applications and determine funding levels and conditions for funding against the above criteria. Consideration will include an assessment of risk affecting the protection of public monies and the achievement of funded activities against the benefits derived from protecting native title interests resulting from successful native title determinations.

(ii) In assessing funding applications FaHCSIA will take into consideration other possible funding sources.

(iii) FaHCSIA will take into account supporting documentation provided with funding applications and may seek additional information from other parties with interests in the native title system.

3. Period of funding

3.1 Native Title Program funding to provide basic support for PBCs will only be provided on an annual basis and PBCs seeking funding beyond the end of the financial year for which funding is approved will need to re-apply for funding for subsequent financial year(s).

3.2 A decision to provide funding for a PBC's administrative costs does not imply, nor should be taken to imply, a commitment to provide funding in response to further applications.

4. Decision

4.1 FaHCSIA will consider applications for funding received and assessed by NTRBs (see clause B1.3-4 above) and will advise the NTRB of the decision as part of the process for approving NTRB budgets, provided that all relevant information required under these Guidelines has been received from the relevant NTRB/NTSP. The NTRB will in turn notify the applicant of the outcome and liaise with the relevant PBC on a strategy for provision of the support provided.

5. Reviews

5.1 Applicants may seek an internal review of any decision made in relation to a funding application.

5.2 A request for an internal review together with any supporting evidence must be received by FaHCSIA within 28 days of the date on which the applicant was notified of the decision.

5.3 FaHCSIA may reconsider/change its decision only where circumstances at the time of making an application have changed, as demonstrated by evidence that was either:

- (a) not in existence at the time the application was made; or
- (b) in existence but not discovered until after the application was made.

C. Applications from NTRBs/NTSPs

1. Overlapping area

1.1 Where a PBC's area overlaps two or more NTRB/NTSP areas, a decision to provide funding will, having regard to the PBC's preference, consider which NTRB/NTSP is able to support the PBC most efficiently and effectively (for example, because of location, or because it was the NTRB/NTSP that facilitated the original claim).

1.2 The funded NTRB/NTSP should provide details of the funding to all other NTRBs/NTSPs affected by the overlap.

2. Procedures

2.1 NTRBs/NTSPs are requested to advise PBCs of the option of applying for basic support funding from the Native Title program, and where necessary and appropriate assist PBCs in preparing their applications. Where a critical need emerges after the annual funding submission process has closed, a separate application may be made⁵ at any time of the year, and any additional funding agreed for this purpose may be made by way of a Variation to the Program Funding Agreement. Basic support funding for PBCs provided in response to an application under these guidelines is additional to funding provided to NTRBs/NTSPs for the performance of their functions under the Act. NTRBs may propose allocation of some of their own resources (in the process of settling their own budgets) to assist with establishing, incorporating and registering a PBC, and to provide support and assistance in kind for the operations of a PBC, including performing the statutory functions of an NTRB in relation to a PBC and assisting the PBC to perform the

⁵ As it may for any other purpose. Such requests will be considered on their merits in light of competing demands for funds and funds availability.

PBC's statutory functions.⁶

2.2 NTRBs/NTSPs should take the following steps:

- (a) consult with the PBC to identify administrative requirements and where appropriate obtain an application for basic support funding under these Guidelines;
- (b) ensure that any application for basic support funding is consistent with the criteria and requirements set out in these Guidelines;
- (c) Undertake an assessment of all PBC applications received and provide the applications, together with a report and recommendations for PBC basic support funding, to FaHCSIA;
- (d) make such other provision as is possible and warranted for PBC support in its own annual budget submission to FaHCSIA for its NTRB activities;
- (e) agree a strategy for the application and management of PBC Basic Support funding with relevant PBCs;
- (f) manage, report on and account to FaHCSIA for any Native Title Program funds provided through the NTRB/NTSP for PBC administrative costs, as required by the terms and conditions of its Program Funding Agreement; and
- (g) liaise with, and account to, the PBCs concerned on the use of their respective PBC funding where basic support funding has been agreed under these guidelines.

NOTE: The NTRB/NTSP will need to show funds allocated for PBC support as a separate prioritised activity in its Operational Plan. This activity will source funds from a discrete separate item in its Financial Budget for PBC Basic support, and from the attribution of expenses under other budget items as appropriate. Funds provided under these Guidelines for PBC Basic support are quarantined from other use unless otherwise agreed by FaHCSIA.

⁶ See footnote 2.

D. Applications direct from PBCs

1. Introduction

1.1 In exceptional circumstances, it may be appropriate for a PBC to apply for direct funding from the Native Title Program. The PBC must seek agreement to apply for direct funding by writing to:

Manager
Land Programs Branch
Department of Families, Housing, Community Services and Indigenous Affairs
PO Box 7576
Canberra Mail Centre ACT 2610

1.2 The PBC should explain its reasons for seeking a direct funding arrangement. Reasons may include:

- the original native title claim was not handled by the NTRB/NTSP for the area;
- there is a significant conflict of interest between the PBC and the NTRB/NTSP;
- other circumstances preclude funding being provided via the NTRB/NTSP (for example, there is a longstanding unworkable relationship between the PBC and the NTRB/NTSP);
- demonstrated good governance; and
- demonstrated ability to administer and account for funding.

1.3 Where a PBC's reasons refer to an NTRB/NTSP, a copy will be forwarded to the NTRB/NTSP for comment.

1.4 Applications received for direct funding to a PBC will not be considered unless FaHCSIA has previously agreed to accept and consider an application for direct funding from the PBC concerned.

1.5 Direct funding for a PBC will not be considered unless, amongst other things, the PBC can demonstrate that it is capable of securing and accounting appropriately for the funds. As an organisation in need of basic support is unlikely to be in this position, it follows that direct funding of PBC basic support is likely to be a rarity.

2. Procedures

2.1 When applying for direct funding, a PBC should:

- (a) Ensure that FaHCSIA has agreed to the PBC applying directly for funding;
- (b) Provide all details and supporting documentation relevant to the application;
- (c) Provide a description of the items/activities for which funding is sought;
- (d) Ensure that the application is consistent with the criteria and procedures set out in these Guidelines;
- (e) Provide details of the outputs to be achieved and a financial budget including all income and expenditure in terms of the native title services provided;
- (f) Attach a copy of its certificate of incorporation;
- (g) Attach a copy of its constitution; and
- (h) Ensure the application is certified by an appropriately authorised person or persons.

3. Notice to NTRB/NTSP

3.1 The relevant NTRB/NTSP will be notified by FaHCSIA if a decision is made to provide funding direct to the PBC.

4. Program Funding Agreements

4.1 Where funding direct from the Native Title Program to a PBC is approved, the PBC will be required to enter into a program funding agreement and observe the terms and conditions of that program funding agreement. Typically, a program funding agreement includes:

- the amount of funding provided;
- the period of funding;
- a budget including details of funded items;
- objectives to be achieved with the funding;
- reporting requirements (both financial and performance);
- accounting and acquittance requirements.

4.2 PBCs are encouraged to seek independent advice on the terms and conditions contained in program funding agreements prior to accepting the funding offered.

Department Of Families, Housing, Community Services and Indigenous Affairs

