



Australian Government

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

Native Title Program

Guidelines for Support of Prescribed Bodies Corporate (PBCs)

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

**Indigenous Programs Branch
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CONTENTS

A.	Policy and Legislative Framework.....	3
1.	Introduction	3
2.	Australian Government policy concerning native title.....	3
3.	PBC Legislative Framework	3
4.	Policy framework for PBC funding	5
5.	Portfolio responsibility	7
B.	Funding – General.....	8
1.	Introduction	8
2.	Funding Assessment Process	8
3.	Period of funding	11
4.	Decision	11
5.	Reviews.....	11
C.	Applications from NTRBs/NTSPs.....	12
1.	Overlapping area	12
2.	Procedures.....	12
D.	Applications direct from PBCs.....	13
1.	Introduction	13
2.	Procedures.....	13
3.	Notice to NTRB/NTSP	14
4.	Program Funding Agreements	14

A. Policy and Legislative Framework

1. Introduction

1.1 These Guidelines provide information about funding to support the day-to-day operations (administrative costs) of 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**.

2. Australian Government policy concerning native title

2.1 The Australian Government is committed to a fair, stable and effective native title system with a focus on:

- whole-of government coordination;
- cooperation with stakeholders;
- resolving native title issues through agreement where possible; and
- the speedy resolution of native title claims.

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

3. PBC Legislative Framework

3.1 PBCs have functions and obligations 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 states 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 the particular native title be held in trust.

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.

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 *PBCs’* statutory functions (for

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

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 Australian Government funding for PBCs' 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 Australian Government subsequently accepted the recommendations in this report.³ It was also decided that PBCs could, in exceptional circumstances, be directly funded for their administrative costs.

4.4 Consequently, NTRBs/NTSPs and PBCs may now apply for Native Title Program funding for the 2009-10 financial year to cover PBCs' administrative costs. Different procedures will apply depending on whether an application is made by an NTRB or a PBC. These procedures are set out in these Guidelines.

Need for funding and availability of funding from other sources

4.5 It is clear that some PBCs will require a level of Australian Government 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, funding for a PBC's administrative costs under the Native Title Program shall not exceed \$100,000 in any financial year.

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

4.7 The Native Title Program should not necessarily be considered a first stop for funding. Funding should also 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 Housing Families, 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:

Indigenous Programs Branch
Department of Housing Families, Community Services and Indigenous
Affairs
Box 7576
Canberra Mail Centre ACT 2610
www.FaHCSIA.gov.au

⁴ The Australian Institute of Aboriginal and Torres Strait Islander Studies is preparing a Toolkit on potential funding sources for PBCs which will shortly be published 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 need to consider applications equitably and against competing priorities. Consequently, all applicants/potential future applicants seeking financial for support of PBCs administrative costs may not be funded to the level sought.

1.2 Funding for a PBC's administrative costs provided under the Native Title Program should not exceed \$100,000 in a financial year.

1.3. Unless there are exceptional circumstances, funding applications for a PBC's administrative costs should be made by 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.

1.4. Funding applications should include documentation supporting the PBC's claims against the criteria set out below.

2. Funding Assessment Process

2.1 Criteria:

Funding applications will be assessed against the following criteria:

(a) Whether the organisation for which funding is sought 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

(i) To ensure 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 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).

(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.

(c) Items eligible for funding as administrative costs.

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 on a case by case basis, 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 support PBCs will only be provided on an annual basis and NTRB/NTSPs or 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 and advise the applicant of the decision within 28 days from receipt of all relevant information.

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 encouraged to apply for funding for PBC administrative costs as part of their annual funding submissions. Where this is not possible, a separate application may be made⁵ at any time of the year, and additional funding for this purpose may be made by way of a Variation to the Program Funding Agreement. Funding for PBCs' administrative costs is additional to funding provided to assist with establishing, incorporating and registering a PBC up to and including its first annual general meeting. It is also additional to funding provided to the NTRB/NTSP to perform, at any time, the statutory functions of an NTRB in relation to a PBC (including, where necessary, by assisting the PBC to perform the PBC's statutory functions).⁶

2.2 NTRBs/NTSPs should take the following steps:

- (a) consult with the PBC to identify administrative requirements;
- (b) ensure that any application for PBC administrative costs is consistent with the criteria and requirements set out in these Guidelines;
- (c) include the PBC administrative costs in its annual application for funds for its NTRB activities (or in a separate application if necessary);
- (d) 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
- (e) liaise with, and account to, the PBCs concerned on the use of their respective PBC funding.

NOTE: The NTRB/NTSP will need to show funds provided for PBC administrative costs as a separate prioritised activity in its Operational Plan and as a discrete item in its Financial Budget, and quarantine these funds from other use unless otherwise agreed by the FaHCSIA.

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.

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:

Indigenous Programs Branch
Department of Housing, Families, 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.

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 the 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.