



Native Title Services Victoria Ltd

2 December 2016

Mr Greg Roche
Special Advisor, Land Housing and Culture Branch
Department of Prime Minister and Cabinet
PO Box 6500
Canberra ACT 2600

Dear Mr Roche

PBC Support Strategy Consultation Paper

The enclosed submission has been prepared by Native Title Services Victoria (NTSV) in response to the Department of Prime Minister and Cabinet's *PBC Support Strategy: Consultation Paper, October 2016*.

NTSV was registered as a company limited by guarantee in August 2003 for the purpose of providing professional services to native title claimant groups in Victoria. It is funded under s203FE of the *Native Title Act 1993* (Cth) to carry out the functions of a representative body as prescribed in that act. NTSV also receives some funding from the Victorian State Government to assist Traditional Owners in negotiations under the *Traditional Owner Settlement Act 2010* (Vic). It is governed by a skills based board of Victorian Traditional Owners.

NTSV welcomes the opportunity to respond to the consultation paper and is committed to working with government to develop policy and legislative reforms targeted at improving the operation of the native title system.

We would be pleased to discuss further any issues raised in this submission. My Executive Assistant, Anh Nguyen, can be contacted by telephone (03) 9321 5305.

Yours sincerely

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Chief Executive Officer

Encl. NTSV submission

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**Native Title Services Victoria – Submission to Department of Prime Minister & Cabinet
December 2016**

PBC Support Strategy Consultation Paper

1. Better engagement

Q1. What is the best way for the Commonwealth to engage with PBCs, now and into the future?

Native Title Service Providers/Representative Bodies (NTRB/SPs) contain existing infrastructure to facilitate engagement between the Commonwealth and PBCs. In Victoria, NTSV as the service provider has established long lasting relationships with PBCs to best enable effective engagement. As such the Commonwealth should continue to engage with the NTSV in the first instance.

The Commonwealth should bear in mind that, for the most part, PBCs do not have the capacity to process requests from government departments and agencies to consult, or comment, on policy, more often than not relegating this responsibility to their NTRB/SP or, where established, a peak representative body. It is the experience of NTSV that where the Commonwealth has sought to engage directly with a PBC, the PBC has contacted NTSV to provide further advice on the type of engagement, or engage directly with the Commonwealth on their behalf, due to the expertise NTSV possesses. It is also NTSV's experience that Traditional Owner Corporations (TOCs) feel overburdened by requests from government to consult with them, often at times in an un-coordinated manner or with little regard to the necessary day to day running of an already under-resourced corporation, and therefore look to NTSV for advice on the level of priority it should afford particular policy issues.

NTSV is not aware of any direct engagement between the Commonwealth and PBCs in relation to PBC support. In the majority of cases NTSV acts as the conduit for this engagement. NTSV however notes that the Australian Institute for Aboriginal and Torres Strait Islander Studies (AIATSIS) maintains a PBC network and regularly communicates with PBCs, as well as NTRB/SPs, on matters which may be of interest to PBCs.

In recent years NTSV has supported the establishment of a peak body of TOCs, the Federation of Victorian Traditional Owner Corporations (the Federation). This body is increasingly undertaking much of the policy advocacy work previously undertaken by NTSV. It is worth noting, however, that NTSV is the current provider of this service. In early 2017 both NTSV and the Federation will undertake strategic planning exercises to map the potential roles and services each entity will provide. It is also worth noting that both boards of NTSV and the Federation are currently undertaking the necessary processes for NTSV to become a subsidiary of the Federation, making the Federation a first of its kind model for how TOCs can take greater control and self-determine the activities of the NTRB/SPs who serve them. In the future it is possible that the department could employ the Federation as a useful mechanism for engaging with PBCs.

NTSV notes, however, that this body receives no commonwealth funding support, and while we see significant merit in the department working with the Federation as a key

consultative body, or potentially a co-developer or deliverer of policies and programs, there is a need to consider the resourcing requirements to perform these functions.

2. More effective, transparent and coordinated funding

Q2. Is current PBC funding reaching those PBCs that need support to maximize available opportunities for economic development and partnerships, within the context of the aspirations of the native title holder group? How can PBCs take advantage of the existing funding arrangements?

Q3. What are your views of these proposed changes to funding arrangements?

Q4. How do PBCs want to get information about funding related changes in the future?

Q5. What are the current support services available to PBCs? How can this be better coordinated?

In Victoria, the current eligibility constraint for PBC funding means that funding does not reach all corporations seeking to maximize economic development and partnerships. Furthermore, this approach sets up a two tier system. As NTSV has noted previously, the eligibility requirements preclude Traditional Owner Group Entities (TOGEs) established under the *Traditional Owner Settlement Act 2010* (Vic) from applying for any type of PBC funding support. NTSV strongly submits that this is nonsense given:

- agreements struck between a Native Title party and the State of Victoria under the *Traditional Owner Settlement Act 2010* are Native Title settlements in that they resolve Native Title Act claimant and compensation claims, and discharge the Commonwealth's compensation liability
- TOGEs perform the same functions as a PBC in a post-determination environment.

NTSV has advocated for TOGEs to be considered akin to Prescribed Bodies Corporate, therefore enabling them to access funding. We understand this matter remains unresolved despite an assurance given by the Minister for Indigenous Affairs to ensure TOGEs would become eligible. NTSV welcomes further discussion with the department on how to best implement the undertaking made by Senator Scullion at a meeting with NTSV on 2 September 2016.

PBC Basic Support Funding

It is NTSV's experience that basic support funding has only been provided to PBCs in the early stages of their development, rather than as ongoing support funding to discharge responsibilities under the *Native Title Act 1993* (and accompanying regulations), and meet compliance requirements under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*. NTSV notes that both the above functions are ongoing responsibilities and can, at times, prove burdensome. NTSV therefore submits that PBCs be eligible to access this funding at any time in their corporate life cycle given the Commonwealth's requirement that they comply with both the above-mentioned Acts, and that the Commonwealth has a responsibility to provide a minimum funding guarantee for administrative and compliance costs of PBCs. The provision of financial support to fulfil legislative requirements means TOCs have greater financial freedom to pursue economic opportunities.

NTSV welcomes the changes made by the department for the 2015-16 financial year to broaden the scope of assistance that NTRB/SPs can provide to PBCs under the program. However, we note that funding for commercial activities remains ineligible under this stream of funding. This complicates the ability to take an holistic approach and limits PBCs opportunities in developing the means to become self-supporting.

NTSV notes the suggestion that a new application process be developed. Whilst the existing application process has been in place for a number of years NTSV considers that the opportunities for improvement are not expressly linked to a new application process. NTSV supports the removal of the \$50,000.00 nominal cap and believes this has in the past stifled development. NTSV does not support any changes to the application process that would increase the burden on PBCs in making an application.

This funding stream should continue to be administered as flexible funding to support PBC-led projects for socio-economic development including the purchasing of grant writing assistance and planning support services for strategic plans, sustainable benefit management, and preparation of business plans and funding models including fee-for-service arrangements, corporate structure and taxation advice. Sufficient funding may, where appropriate, ensure the aspirations of the broader native-title group are captured however NTSV notes that there is no obligation on a PBC to take into account the aspirations of native title holders who opt not to participate in the corporate life of the PBC, and the department should not seek to mandate this in any way as to do so diminishes self-determination.

The provision of funding directly to people and organisations to purchase services has had success across a range of areas of government policy. However, it generally requires a strong market and low information asymmetry to delivery benefits and efficiencies. NTSV submits that directly funding PBCs in an environment of weak markets (few appropriate providers) and high information asymmetry (where PBCs and service providers are often not aware of the requirements, value and processes for engagement), the role of the intermediary (NTRB/SPs) becomes significant in assisting so as to ensure the direction and expertise is best applied. If this approach is adopted, NTSV anticipates that increased funding will be required to support the role of the intermediary.

Moreover, as NTRB/SPs maintain a duty to act in the best interests of their clients, there is a stronger link between the NTRB/SP and PBC in the building of on-going capacity and service provision, as opposed to 'fly by night' consultants, and better value for money in that time and effort in understanding the sector and context is reduced. The ability for local NTRB/SPs to coordinate and bring together different skills and programs is also a key manner in which the value for money can be increased. NTSV therefore submits that where there is a move to increase the direct funding to PBCs, consideration be given to maintaining a process of coordination and building the ability of NTRB/SPs to provide the appropriate services.

Based on the changes proposed in the table- to direct funding directly to the PBCs- it appears that there will be a reduced role for NTRB/SPs. While NTSV supports the move to enhance self-determination, we note that this may require increased funding, particularly where PBCs seek assistance in managing the funding and acquittal processes, to provide the early warning and risk mitigation processes for both PBCs and the funding agency. While the fees for such services are most likely subsidised through integration with other activity, it is nevertheless a small way to maintain the income of the NTRB/SP and to retain the level of expertise and local knowledge that resides within the NTRB/SPs and the infrastructure to manage processes and advice that ensures strong coordination and appropriate targeting.

NTSV does not support a process of decision-making for PBC Basic Support funding on individual cases that increases the time requirements or level of information and processing

for applications, particularly if this process includes Ministerial authorisation. NTSV further notes that whilst applications for basic support funding have been made in advance of the commencement of financial years, decisions from the department have not been forthcoming in some cases until nearly 9 months after the application was made. Such protracted delays result in PBCs being unable to implement operating budgets until well into the financial year.

PBC Capacity Building Funding

NTSV notes clients' initial confusion regarding this new stream of funding, with many at first believing the Capacity Building funding to be a repackaged form of Basic Support Funding. NTSV further notes that limited information was provided to NTRB/SPs regarding this funding making it difficult for them to provide sufficient support to PBCs in the making of applications.

NTSV supports the department's recommendation that a simplified assessment process be applied in order to best minimise administrative burdens on PBCs. However, we submit that the application process must also be simplified as it is currently too onerous and acts as a deterrent. The current application process, which mirrors applications made under the Indigenous Advancement Strategy, assumes a level of capacity within the PBC which often does not exist. While NTSV is keen to help build PBC capacity, the level of capacity required to obtain this funding is very often beyond the capacity of the PBC, in terms of the application, project management and ability to acquit the funding.

Whilst the majority of support to PBCs comes from NTRB/SPs, and the expertise in providing these services should not be underestimated, NTSV also notes that often third parties are talking directly to PBCs indicating they can offer free services, when in reality they are really finding ways to fund activity through the services. The NTRB/SP has a strong appreciation of the context and capability of PBCs, and is therefore in a strong position to assist in identifying and directing funding, where often this is not easily done by the funder alone, or through a third party, particularly where the third party is in a conflict of interest as the potential service provider.

NTSV therefore submits that:

- PBC capacity funding be flexible to allow for both PBC and NTRB/SP applications, where this would assist individual PBCs or groups of PBCs to best benefit from the funding stream
- services purchased by PBCs with grants from this pool of funding should be purchased from, or in conjunction with, an NTRB/SP that has the skills to contribute to the planning and project direction and risk management
- the funding recognise that there is a degree of coordination and strategic consideration across projects and PBCs
- the system recognises the benefits of NTRB/SPs' role to ensure third parties are not exploiting PBCs and also to ensure PBCs do not place themselves at unnecessary financial risk
- where there is a need to promote programs or inform PBCs on the opportunities and benefits of the available programs, the NTRB/SPs could in fact be considered a closer agent of the department, with potential arrangements acknowledging the level of service provided

3. Other support

Q.6 Are PBCs interested in participating in (sector-facilitated training and networking, promoting information about successful and diverse use of Indigenous land, facilitating engagement between PBCs and the private sector)?

Q7. Is there interest in funding for this purpose? How can it be prioritised?

It is NTSV's experience that training alone does not build long-term organisational capacity. At a foundational level, organisational capacity comprises elements including governance fundamentals (constitution, legal form and tax-status, board structure and roles), strategy, risk management and compliance, financial stewardship, a business model, an investment strategy, communications and stakeholder management, organisational structure and staff and performance management. The products – plans, agreed processes, policies and procedures, etc – required to establish these elements are not produced by participating in training and require dedicated personnel working with a board to establish.

Whilst some governance training is provided by the Office for the Register of Indigenous Corporations, NTSV is cognisant that PBCs have additional responsibilities, often beyond the 'basic' compliance, meaning generic training is not necessarily of benefit. While generic training may be appropriately delivered through a market based approach, a step change in the level is also required to assist in building capacity tailored to the organisations moving beyond basic compliance.

A tailored training service for PBC staff and directors would be more efficiently administered by contracting with a single service provider rather than through multiple providers in a panel arrangement. A single contractor would be better placed to collect and monitor training evaluation data, improving the effectiveness of the training program. NTSV notes that the Aurora Project has, in recent years, opened its training up to PBC participants with varying levels of success however understands this arrangement has now been discontinued.

NTSV notes that AIATSIS often supports the attendance of PBC delegates at their National Native Title Conference. Feedback from PBC delegates is that these conferences are of little benefit to them however do provide an opportunity to meet with other PBC delegates from across the country, and that this networking experience is of somewhat benefit. Over the past 18 months NTSV has supported the Federation to host smaller subject matter focused forums and seminars covering topics such as preferential procurement, water rights, and native title assets. Feedback from PBC participants who have attended these forums has been very positive with delegates particularly enjoying the approach taken to focus on a dedicated subject matter, hear from experts in the area, and discuss and share their ideas and experiences in an open forum. NTSV notes however that a single PBC would struggle to host such a forum and therefore submits that either NTRB/SPs receive additional funding to run subject specific forums, or, in the absence of this, consider applications for funding from conglomerates of PBCs.

4. Minor legislative and institutional role reform

Q8. 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?

On the face of it, such a system could lead to earlier consideration and potential resolution of disputes, although it is assumed, given reference to final, perhaps a quasi-judicial body is being referred to.

NTSV is regularly approached by members of native title groups who have issues with the PBC, its decisions and operations. Our ability to assist such members is limited where we have service agreements in place with the PBC and is usually limited to basic advice about rule book interpretation and recommendations to approach the PBC directly with concerns. In most cases, confidentiality concerns and legal ethical issues arise, meaning disputes remain unresolved or external (non-native title lawyers) become involved, which often complicates things. In other instances, disputes within a group and the PBC have been mediated through the State's Right People for Country process. Whilst this process often takes time, it highlights the benefits of a third party being involved.

Any third party system should obviously involve those with the requisite expertise and experience in this sector to ensure that it remains low cost.

While the PBCs needs to be accountable to Native Title holders it is important that the Native Title holders are clear that they are not bosses for the board or staff and that they do not have a right to waddle in, throw their weight around and bully staff and boards. Clarity around accountability needs to be balanced with clarity around the fact that Native Title holders cannot interfere with operations or governance.

Q9. How could the accountability of PBCs to native title holding groups for compliance with the PBC Regulations be improved?

Native title holders have the option of seeking advice from NTSV or ORIC

There is at times a lack of clarity around what is required by the PBC regulations and how that interacts with a PBC's rule book. There are also individuals who become more actively involved after incorporation and don't have the benefit of the historical knowledge surrounding incorporation. One option might be to require PBCs to produce a plain language summary of how their processes ensure compliance with the PBC regulations. This would necessitate a review of existing process (both formal, i.e. the rule book, and informal (policies and procedures)) which would assist compliance and publication of a document would assist transparency.

It's unclear whether native title holders who are not members of the corporation can access the dispute resolution functions in the rule book. In any event, these dispute resolution clauses could also be revisited.

Q10. 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?

Yes. However, transparency and accountability should be nothing more onerous than the obligations of a non-Aboriginal corporation to its members. The provision of audited accounts showing where money was spent at AGMs should suffice. NTSV also notes that not all Native Title holders will be members, so perhaps some provision can be made for supply of such to non-member Native Title holders also.

Where native title monies are held outside the PBC and actively managed and invested, then the regulations should apply, as this would be consistent with obligations placed on PBCs and likely an important safeguard as the market for these types of services increases. There is less need where native title monies are passively held (for example by a representative body on trust in the absence of a PBC or trustee) provided there is a mechanism for regular reporting to the group to ensure all understand the basis on which the money is held.

Q11. 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?

NTSV's experience is that standing authorisations and alternate-decision making processes work well, with a number of PBCs having incorporated these mechanisms into their rulebooks. Reliance on such streamlined decision-making processes obviously has benefits for streamlining decisions and reducing the costs of consultation, but relies on there being capacity, trust and a good working relationship between the delegated body (often the Board) and the native title group. NTSV has no current suggestions for improvement to these mechanisms.