National Native Title Council

spirit of Change

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Resources Sector Regulation study
Productivity Commission
LB2, Collins Street East
Melbourne Vic 8003

Via Email: resources@pc.gov.au

Dear Sir/Madam

RE: RESOURCES SECTOR REGULATION: PRODUCTIVITY COMMISSION DRAFT REPORT, MARCH 2020.

The National Native Title Council (NNTC) welcomes the opportunity to provide comment on the draft report of the Productivity Commission that examines regulations affecting business investment in the resources sector in Australia.

The National Native Title Council is the peak body of Native Title Representative Bodies (NTRBs), Native Title Service Providers (NTSPs) and more recently Traditional Owner Corporations, such as Prescribed Bodies Corporates and Traditional Owner Group Entities[1]. The objects of the National Native Title Council are, amongst other things, to provide a national voice for the Indigenous native title sector on matters of national significance affecting the native title rights of Aboriginal and Torres Strait Islander people. The NNTC was incorporated as a public company limited by guarantee under the Corporations Act in 2006.

Introduction

The NNTC encourages the Productivity Commission to consider how agreement making in the resource sector can better benefit Aboriginal and Torres Strait Islander communities via native title groups or Prescribed Bodies Corporate (PBCs). It is important that PBCs are the party to agreement making as they have the cultural authority and legitimacy of the rightful owners of the land to make decisions concerning land, water and resources.

[1] Traditional Owner Corporations in this submission is used as a generic term to include a range of corporate structures under various State and Commonwealth legislation, including Prescribed Bodies Corporate and Registered Native Title Bodies Corporate under the Native Title Act 1993 (Cth.) and Traditional Owner Group Entities under the Traditional Owner Settlement Act 2010 (Vic) ("Settlement Act")

Statutory duties of PBCs and native title applicants

It is a decision of the PBC to consider how an agreement will benefit native title holders and the broader community who may not hold a cultural connection to land, for example through benefit sharing, rather than a decision of a non-Indigenous party to the agreement.

In recent years, the duties of those members of the native title group who are authorised to make a claim (who are known collectively as the 'applicant') have received judicial consideration and clarification. The Federal Court has held that those persons who comprise the applicant owe a fiduciary obligation to the wider native title claim group.[2] The Court has also noted that the benefits of a native title agreement are held for and behalf of all those who are determined to hold the common or group rights comprising the native title rights.[3]

Furthermore, when a native title claim is successful and a determination finalised the role of the applicant as a native title party ceases to exist, and this role is assumed the PBC. It is prudent and preferable for these matters to be clearly spelt out in native title agreements when they are being drafted to avoid any confusion or uncertainty.

A PBC has similar obligations to its members and the common law holders, and this duty forms part of the decision-making processes for agreements and benefits. An applicant acts on behalf a native title claim group and a PBC on behalf of the common law holders and its members to facilitate the effective management and exercise of their rights and interests, including those of agreement-making. To require all detailed aspects this decision-making process to be dealt with by the broader group of claim group members or common law holders would make agreement-making unreasonably resource intensive and inefficient, and potentially unattainable by larger groups.

PBCs already have compliance and transparency obligations under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*, including financial reporting and transparency of meeting records upon request. This ensures transparency to their members of income from agreements or major decisions regarding benefits.

Managing native title monies

The NNTC agrees that there are issues concerning non-native title organisations acting as private agents in future act negotiations who can then secure for themselves any proportion of any benefits for themselves, some who poorly manage or misuse native title funds, as well as additional legal and administrative complexities for PBCs managing native title funds for economic development.

The NNTC has previously advocated for an alternative tax designation for Indigenous organisations that receive native title benefits — the Indigenous Community Development

[2] Gebadi v Woosup (No 2) [2017] FCA 1467
[3] Ibid

Corporation (ICDC), which led to the revised proposal – the PBC Economic Vehicle Status (EVS), which would allow organisations receiving native title benefits to access the tax concessions associated with charities, while allowing them to undertake a broader range of economic development activities.[4] This would enable the PBC EVS to undertake a broader range of economic development activities, such as providing finance for private businesses, while accessing tax concessions that apply where an organisation is seeking to address disadvantage.

Importantly the model would also enable to legacy trust funds to be rolled into the PBC EVS. The model would also include additional transparency and reporting requirements. The principles behind the PBC-EVS have already been endorsed by the Treasury *Taxation of Native Title and Traditional Owner Benefits and Governance Working Group* in 2013 and in the 2015 *Our North, Our Future, White Paper on Developing Northern Australia.*[5]

There has been some recent confusion over why the current regulatory regime, given the introduction of the *Charities Act* in 2013 and recent ATO and ACNC rulings/guidance, is not sufficient, as it does allow Indigenous organisations operating for charitable purposes to receive the tax concessions available to all charities and pursue some economic development activities. Even with these recent developments, there are still the following issues with current regime that the PBC EVS model seeks to overcome:

- The ACNC rulings provide limited clarity on what economic development can occur and for whom, particularly around investment of charitable monies and private benefit;
- ATO/ACNC rulings on whether individuals, families or native title groups are sufficient for public benefit limit local Aboriginal and Torres Strait Islander decision-making powers;
- The current PBC and trust regime is unnecessarily complex in corporate governance requirements;
- Trust compliance and regulation has been difficult with the ACNC, particularly in northern Australia; and
- Difficulties in rolling over legacy trust funds if the PBC is dissolved or changes form.

The NNTC is currently working with Associate Professor, Dr Ian Murray, University of Western Australia, and the Minerals Council of Australia to refine the PBC EVS model in preparation for the forthcoming CATSI Act and NTA reforms.

[4] The PBC EVS model replaced the ICDC model as it would involve utilizing the existing PBC structures, legislation and compliance.

[5] NNTC Submission to the Corporations (Aboriginal and Torres Strait Islander) Amendment (Strengthening Governance and Transparency) Bill 2018, 18 January 2019, p.3.

Effective community engagement

Free, prior and informed consent (FPIC) of Aboriginal and Torres Strait Islander people to developments affecting their traditional lands is an important part of agreement making, but it is not sufficient to only rely on this principle. Best practice agreement making would also include the right to veto. The sorts of financial outcomes being delivered by agreements concluded under the Right to Negotiate (RTN) provisions of the NTA are in general less than the those delivered by land rights legislation, Queensland's Mineral Resources Act, or by 'policy-based' negotiations where there is no legislative requirement for mining companies to negotiate agreements.[6] Resource sector companies could incorporate this right into agreement making, even when the legislation, such as the Native Title Act 1993, does not provide a supportive legislative framework.

Supporting organisation capacity to enter agreement making

As noted by the report: resourcing and capacity constraints of PBCs not only affects engagement with Aboriginal and Torres Strait Islander communities, but also impose a barrier to effective benefit sharing the ability to negotiate agreements effectively, according to the principles of FPIC.

While there is Commonwealth Government funding through the Indigenous Advancement Strategy (IAS) and some company funding available to PBCs, it is often difficult and complex to access and is not sufficient for the number of PBCs. Previously the NNTC has noted this insufficiency and recommended that PBCs be provided with three-year recurrent funding of $300 000 per year per PBC for core statutory functions, and that funding for NTRBs and NTSPs be increased by $50 million.[7]

This is a public submission in that it does not contain 'in confidence' material and can be placed on the Commission's website. The NNTC also gives consent for the Commission to contact us in relation to other Commission work.

I trust these comments are useful for your purposes, however if you have any queries or require any further information please do not hesitate to contact Belinda Burbidge at your convenience.

Yours faithfully,

Jamie Lowe
Chief Executive Officer

[6] Ciaran O'Faircheallaigh, 2004. Native Title and Agreement Making in the Mining Industry: Focusing on Outcomes for Indigenous Peoples. Land, Rights, Laws: Issues of Native Title 2(25), p. 7.
[7] National Native Title Council, 2018. Pre-Budget Submission, p. 2-3.