



**Kimberley Land Council**

**Submission to:**

**Department of Prime Minister and Cabinet  
PBC Support Strategy - Consultation Paper**

**December 2016**

The Kimberley Land Council (**KLC**) provides the following submission to further inform the work already under way by the Department of Prime Minister and Cabinet (**DPMC**) being undertaken with the intention of ensuring that the native title system is sustainable. “Sustainability” in this regard is if native title holders are best placed to achieve economic independence and advance social and cultural wellbeing.

There are three key themes which highlight the most critical need for the support of this objective.

- Recognition of Native Title as land ownership;
- Support of regional interests; and
- Alignment of corporation structures with native title ownership and cultural decision making practices.

### **Background:**

The KLC is a grassroots community organisation established by Kimberley Traditional Owners working for and with Traditional Owners of the Kimberley to get back country, look after country and get control of the future. The KLC is also a representative Aboriginal / Torres Strait Islander body recognised in a determination made under s203AD(1) of the *Native Title Act 1993* (Cth) (**Native Title Act**). The KLC is directed by a representative board from native title groups in the Kimberley. Approximately half the board consist of representatives from prescribed bodies corporate (**PBCs**). The KLC has been actively involved in supporting and developing PBCs for over a decade, with over 75% of the Kimberley region now being the subject of native title determinations. The support provided is significantly influenced by the funding conditions established by the Commonwealth government. These conditions have ranged over time from total restriction on assisting PBCs post native title determination, to limited funding allocated to support PBCs for specific purposes. At present, the KLC receives limited native title grant funding each year for PBCs within its representative body region, and expends these funds almost exclusively on compliance and governance (i.e. running annual general meetings, directors’ meetings, and mandatory annual reporting). Existing levels of funding to PBCs therefore does not contribute to development of sustainable organisations, and is almost entirely consumed on achieving basic governance and compliance.

Despite changes in Commonwealth funding priorities, the KLC has continued to drive PBC development in accordance with the strategic objectives of the organisation which include:

**Functional and empowered Prescribed Bodies Corporate** - PBC board members are able to meet their statutory requirements and secure positive outcomes for their members from native title; and

**Strengthen Native Title rights** - Traditional owners are able to realise their aspirations through access to opportunities that arise from tenure over native title lands.

The KLC has a significant body of experience in working for and with PBCs in the region and continues to provide these services in the most effective and cost efficient way possible. The information provided in this submission is highly informed and reflects the experiences of the Kimberley region.

The KLC supports the Commonwealth's principles, and would add to those principles that the role of government is to facilitate effective mechanisms for native title ownership in which native title holders can fully express their rights in land including for economic purposes. This includes through the recommended amendments to the Native Title Act proposed by the COAG Native Title Working Group and through the support for litigation to develop case law which clarifies the nature and extent of native title rights recognised by the common law of Australia.

## **1. Better engagement**

The best way for government or any other stakeholder to engage with PBCs is to clearly and in a culturally appropriate manner inform the PBCs on the nature of the engagement. Information should be provided to the PBCs designated contact person or representative. Engagement can also include having information presented at a PBC board meeting. If decisions are to be made or advice provided the PBC may require additional consultation with members of the native title group, in some situations legislation requires that consultation and consent is obtained from the broader native title group. Engagement where native title decisions are required must also require resourcing. Resourcing is defined under section 60AB Native Title Act and the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth) (**PBC Regulations**). Resourcing needs are unique to the particulars of the individual operating environment of the PBC, but in all cases must ensure compliance with the requirements for the making of a native title decision under regulations 8 and 9 of the PBC Regulations.

PBCs are constantly balancing the demands for engagement and the needs of the corporation including the needs of both the native title holders and members of the PBC, which are

separate and distinct groups. Often PBC meetings are dominated by the demands for engagement from a range of government, industry and other stakeholders, which can overshadow the business of the organisation. This is often a result of the limited time PBC boards have to meet. The infrequency of board meetings and the length of time PBCs have to meet are often influenced by the resources PBCs have to call and hold meetings. This includes the availability of staff to plan and coordinate the board to meet, especially given that most board members are required to travel to attend meetings as they live in remote locations, and most board members are not paid for the time to attend PBC meetings.

Adequate resourcing is in part complicated by the process of implementing section 60AB of the Native Title Act, especially where 60AB does not capture all forms of engagement. It is the view of the KLC that this process is flawed and not consistent with the requirements of the PBC Regulations. This is particularly marked where government and non-government agencies have a view that PBCs receive commonwealth funding for the purpose of progressing their proposals (either through board level consideration or prescribed native title decision making processes) and are not aware that this funding does not fully fund all costs.

Because PBCs can meet infrequently, and governance can be difficult to achieve effectively where constrained by capacity and lack of funding, anecdotally the KLC is aware of some cases where stakeholders avoid engagement with PBCs and do not fully comply with the Native Title Act.

A significant portion of consultation and engagement costs are subsidised by the KLC or from the resources generated from native title agreements and other business opportunities arising from their native title rights and interests. In the 2015/16 financial year the KLC contributed over \$1 million toward PBC support services in addition to the \$500K provided by the Commonwealth for PBC support funding.

It is unknown what proportion of cost is contributed from benefits derived through future act agreements, for those PBCs who have them. It would be fair to say that the benefits from these agreements were not intended to subsidise engagement with proponents, but instead should be used to develop a sustainable PBC and improve the immediate and future circumstances of affected native title holders and their communities. To adequately resource engagement with proponents, PBCs require a simplified mechanism to apply costs. In the Kimberley an agreement was established with the State Government to coordinate all State government agencies through a standardised engagement process. This system allowed agencies to engage through a single portal without having to negotiate individual cost agreements. The efficiency of this process allowed for PBCs to prioritise resources on

engaging without the administrative burden of having to negotiate on the cost of engagement. However this process is no longer in place.

## **2. Effective, transparent and coordinated funding:**

In the Kimberley under the current arrangements funding is reaching PBCs that most need support, however this support is limited to basic governance and compliance support work due to the limitations on current funding level. The more critical questions are what mechanisms are in place at present and what mechanisms are needed in the future to maximise economic development and partnerships for sustainable PBCs? It is the view of that KLC that without a strategic consideration by both Commonwealth and State Government of native title as a common law right, as a future act procedure, and as a springboard for closing the gap, the 'native title system' will continue to fail to deliver to Indigenous Australians. Native title should be strategically harnessed as follows.

### **A. *Make native title real to native title holders and those they engage with.***

At present, there is a very low level of understanding and clarity of what native title allows native title holders to do. On one view it is a property right protected by the common law and other laws of Australia, including the *Racial Discrimination Act 1975* (Cth) and the Constitution of the Commonwealth of Australia. On another view, prevalent within industry and some government departments, it is a "cultural right" only. The nature and content of native title should be clarified, ideally by legislation, which provides certainty for all parties.

### **B. *Shift the burden of future act administration off native title holders.***

A significant portion of the costs of the 'native title system' relate to future acts; that is, where a non-native title holder wants to obtain rights in land subject to native title determinations or a registered claim. While some major future act negotiations are funded by the proponent the majority of day to day future act matters are not. These costs should not be borne by native title holders alone, and should be shifted to proponents. Shifting costs to proponents also has the benefit of providing PBCs with the resources to deal with these issues faster, benefiting proponents. These types of measures would also provide clarity for other future act processes, for example by putting parameters around what is required for "good faith negotiations."

### **C. *Allow native title holders to use their property to improve their lives.***

This objective is linked with objective "A". If native title recognised by the common law is allowed to operate within the Australian economy in a manner similar to

equivalent non-native title rights (whether exclusive rights, such as freehold, or non-exclusive rights such as leases), the native title holders will have a real opportunity to use native title to move away from welfare dependency and improve life outcomes for current and future generations.

### **3. Other Support**

PBCs in the Kimberley region are being provided with support from the KLC to assist primarily with basic corporation compliances. Some PBCs are receiving more advanced support where resources have been sourced from the negotiation of agreements. More advanced support includes cultural governance through the process of native title decision making, basic financial management, project management and, in some circumstances, managing contracts such as grant agreements. It is through the opportunities for agreement negotiation that groups can also build capability, however, this only occurs in a happenstance fashion depending on whether the native title area is subject to development. In the Kimberley, and throughout Western Australia, the field of PBCs with funds from agreements to drive their own capacity development is patchwork and, with the end of the mining boom, increasingly uncertain and changeable. Not every PBC has a mine, active oil, gas or hard rock exploration. Those that do not have such opportunities are typically totally reliant on the limited funding made available for PBC support.

The KLC and other representative bodies are uniquely positioned to provide PBC support, given their expertise and track record in engaging with and developing PBCs. However the capacity of the KLC to provide this support under the current funding structures is limited.

The KLC has established capability assessment tools for PBCs to self-develop across a range of criteria that over time can be used to indicate levels of growth and maturity. The capability assessment also provides for a prioritisation of service provision to best target the needs of the PBC that will be the most effective in building capability and potentially sustained self-sufficiency. There are however a number of compounding factors that can impact PBCs in achieving sustained self-sufficiency. It is not known what the critical mass or threshold is to determine self-sufficiency. Engagement through the work being develop by the KLC will provide more qualitative data and informed analysis over the coming years to better respond to the questions raised in DPMC's consultation paper. However, anecdotally, the factors that appear to impact on the sustainability of PBCs may include:

- Regular turnover of directors on PBC boards
- Turn-over of staff and loss of corporate knowledge;

- Differing levels of understandings and different interpreting of rule book clauses;
- Dilution of complex cultural decision making in the PBC structure and rule book;
- Limited understanding on the complexities of Native Title decision making;
- Additional legislative requirements of PBCs beyond those of ordinary Aboriginal corporations governed by ORIC and the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth);
- Difficulty in attracting suitably qualified and experienced staff;
- Complex Future Act burdens, which are exacerbated in prospective mining, oil and gas regions or where significant government infrastructure is planned
- Absent or limited PBC policy or procedure documents;
- Absent or limited strategic plans (or ineffective strategic plans);
- Absent or limited land tenure and land use plans;
- internal disputes and limited mechanisms available to resolve disputes;
- An emerging for-profit PBC support consultancy industry which in part is characterised by providers with a poor understanding of the native title act, little regard for the fragility and emerging nature of PBC capacity, and frequent unprincipled conduct; and,
- Absent or limited guidance or advice available to PBCs to assess the suitability of or appropriate need of for-profit consultancy service providers.

Further support is also needed for PBCs to assess the economic footprint of their determination for economic development opportunities which includes land tenure analysis and land planning for future economic, cultural and social aspirations. This must also include support for PBCs to appropriately and comprehensively consult native title holders to develop transparent protocols for culturally appropriate native title decision making. Such mechanisms can then provide the foundation for the PBC to manage and potentially expedite future decision making with regard to economic, social and cultural projects including for projects initiated by individual native title holders.

#### **4. Legislative and institutional role reform**

*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?*

The KLC supports increased assistance to PBCs to reduce the number of disputes and the time in which it takes to resolve disputes. In relation to proposals for “low cost and final dispute resolution”, such a process would be supported provided that dispute resolution service

providers were appropriately qualified and experienced, with a particular focus on or understanding of the cultural and legal context of native title. While the KLC supports the concept of “low cost” mechanisms, these should not be mistaken for underfunded processes which may cause more harm than good. That is, a low cost dispute resolution system is supported provided it is adequately resourced to deliver the services required.

The KLC also supports consideration being given to limiting the matters which may be “disputes” that are within the responsibility of PBCs to resolve. Communal land management is likely to involve any number of issues, but not all of these should be the responsibility of the PBC to resolve.

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

*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?*

The KLC reserves its position on this issue pending further detail on the proposed regulatory changes, but notes that any controls placed on funds held by PBCs should adequately distinguish between monies which are by on trust for native title holders and monies which are otherwise at the disposal of the corporation or subject to some other arrangement. This distinction is important because while some PBCs are single-purpose entities, many carry out a range of functions and operations in addition to PBC functions, and these non-PBC related activities should not be subject to undue constraint arising out of a lack of distinction between native title monies and other monies.

*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?*

The KLC supports the use of streamlined decision making processes to reduce the burden on PBCs and native title holders associated with future acts and the technical requirements of native title decisions in the PBC Regulations. A program of training for PBCs on their native title functions, similar to that delivered by ORIC on general governance responsibilities, should be developed to include streamlining processes, as well as information on general responsibilities of PBCs and the rights and responsibilities of native title holders to their PBCs.

There are currently a range of initiatives designed to improve mechanisms for PBCs to manage the responsibilities of PBCs and the rights and responsibilities of native title holders



to their PBCs. This includes initiatives that support PBCs to develop cultural governance and native title decision making policy. The KLC have developed a comprehensive policy and practice paper on transferring Native Title materials to PBCs which is designed to also support and develop the capabilities of PBCs in managing cultural governance and native title decisions. Native Title materials are a valuable resource that PBCs can use to access information from the research generated during the native title claim.

The process for transferring native title material sets in place steps for the PBC to design, plan, manage and develop a comprehensive policy and process for incorporating native title research materials along with the PBCs cultural decision making practices into a format that can support the PBC in managing native title materials. This process can potentially be complemented with policies around culturally aligned responsibilities of the PBC and their obligations under the PBC Regulations. The development of policy documents will also assist the PBC to manage internal disputes regarding PBC membership and the rights of individuals in making decisions that affect native title rights and interests.