

Framework for working with native title groups in establishing and managing socially and culturally sustainable Prescribed Bodies Corporate

**Prepared for Yamatji Marlpa Aboriginal Corporation
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Introduction

This Framework aims to provide a set of concepts and principles to inform work by NTRBs, NTSPs and others with native title group in the design and subsequent management of their Prescribed Bodies Corporate (PBCs), and once registered their Registered Native Title Bodies Corporate (RNTBCs). This document is based on information presented and discussions held at a workshop held with YMAC staff 24 – 25 November, 2015.

The Framework does not aim to be a comprehensive and prescriptive ‘how to’ manual for PBC design and management; rather, it aims to provide ‘tools to think and work with’ in this complex arena, and to supplement existing experience with PBCs. There are also other publicly available materials, including those available from the Aurora Project and the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS). In particular, this Framework is designed to build on two publications:

A Guide to Writing Good Governance Rules for prescribed bodies corporate and registered native title body corporate prepared by the Registrar of Indigenous Corporations (ORIC), which is attached to this Framework document as **Appendix 1**; and

Fact Sheet: Legal context for PBC decision making prepared by the Aurora Project, which is attached to this Framework document as **Appendix 2**.

The Framework is informed by anthropological understandings of widespread Aboriginal values and practices, especially those relating to political and ethical values, authority, decision-making, and the relationships between individuals and wider collectivities.

The concept of ‘governance’ is central to the Framework, and more particularly the concept of ‘governance arenas’—different arenas in the operations of PBCs and other Aboriginal organisations in which there may be different bases on which legitimate authority can be exercised, diverse kinds of decisions made in accordance with varying forms of knowledge, and different individuals or groups who may legitimately make those decisions in the different arenas. The concept of governance arenas is discussed at length in Martin, Bauman and Neale 2011,¹ but is briefly outlined later in this document.

Although the Framework is informed by anthropological thinking, it has also been developed on the premise that the design of PBCs and the subsequent support for their management by the Aboriginal people concerned, should whenever possible be undertaken by teams—for example comprising lawyers, anthropologists, Aboriginal field staff, accountants, resource economists, geographers, and others as appropriate and relevant to the particular matter.

As well as being based on a community and sustainable development approach, the Framework aims to address a number of common problems to be found in the design and operation of PBCs. These are:

¹ Martin, DF, T Bauman and J Neale 2011. *Challenges for Australian Native Title anthropology: practice beyond the proof of connection*, Research Discussion Paper No. 29, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra.

- In both PBC design and operation, there is all too often disproportionate attention paid to the ‘*internal governance*’ of the PBC as a corporation—much of which is concerned with the organisational governance and compliance matters set out in the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (the ‘CATSI’ Act).
- Conversely, not enough attention is paid to the *governance of what the PBC does*, most particularly its statutory functions in holding or managing Native Title. Thus, while ORIC’s publication *A Guide to Writing Good Governance Rules*, mentioned above, is a very useful resource it is focused almost exclusively on internal governance issues—reflecting ORIC’s own statutory functions.
- The common problematic assumption made is that because a PBC’s primary statutory function is to hold or manage Native Title, it should operate under the traditional laws and customs of the relevant group; for example, its membership should equate to the membership of the native title group, that all its decision-making should reflect law and custom, and that law and custom provide relevant principles for its internal governance.
- Further common problems in the design and management of PBCs arise from the inadequate attention given to establishing agreed mechanisms for decision-making in dealings with Native Title, and other important matters concerning the management of traditional lands and waters.
- The unexamined implications of codifying traditional law and custom, and other more informal values and practices which may be part of a distinctive way of operating for Aboriginal groups. One particularly common example of what amounts to a form of codification of law and custom results when the structure of a PBC’s board is set up so that it supposedly reflects the structure of the group of native title group itself (for example, Directors representing family groupings).² Another common example is when decision-making processes within the group are codified into the Rules of the PBC, or in a Procedures Manual or the like.
- Related to the above, significant issues can arise from the common failure to distinguish between the Members of the PBC (whose primary functions and responsibilities concern corporate governance, and the native title group).

This Framework document does not propose that codification is necessarily an inappropriate course of action. Indeed, in contexts where what constitutes law and custom (as well as who has the legitimacy and authority to state it) are themselves subject to disputation amongst the native title group, it may be necessary to negotiate an agreed codification of relevant aspects of law and custom, and have that reflected in the Rules or other legally binding mechanism. Nonetheless, it is important that the entailments of codification are considered before it is implemented in an unexamined fashion.

More generally, the Framework as a whole provides a cautionary argument against the unexamined incorporation of either ‘traditional law and custom’ or other manifestations of the customary social and cultural values and practices of the native title group into the internal governance of the PBC itself (especially where there is conflict amongst PBC members or within the native title group). It proposes that there may be reasons for doing so, such as those noted immediately above, but to bringing law and custom into the heart of corporate (internal) governance without careful consideration of unintended consequences

² Codification is discussed at some length in Mantziaris and Martin 2001, *Native Title Corporations: a legal and anthropological analysis*, The Federation Press, Sydney, pp. 41-3, 308-10.

may render a PBC inherently unstable and thus unable to serve its fundamentally important role of protecting, managing or holding the native title for the native title group.

Background concepts and principles

In this section, the Framework document sets out summary concepts drawn from anthropological understandings of both classical and contemporary Aboriginal societies, which are relevant to the design and management of PBCs.

Introductory concepts

Prescribed Bodies Corporate operate within a very technically complex arena in terms of the statutory framework under which they are established (for example, they have to be incorporated under the CATSI Act), and which sets out their functions; the term ‘prescribed’ body corporate accurately reflects this highly prescriptive regime.

However, they also lie within an equally complex intersection of Aboriginal life worlds, values and practices and those of the wider society. This intersection cannot be simply cast as operating in ‘two worlds’, because those Aboriginal life worlds are themselves ‘intercultural’—drawing not only on the past traditions of Aboriginal societies but also on the values and practices of the broader Australian society through the whole history of engagement with it.

The Framework document takes a community and sustainable development approach in setting out principles to consider in assisting native title groups in the design and management of their PBCs. This means:

- All work undertaken in this field should aim to enable PBCs and other entities that are established (for example, Trusts) to support the native title group and their aspirations;
- All work should aim to be participatory and collaborative, and ultimately outcomes be controlled by, and seen as legitimate by, the native title group;
- That is, PBCs and other organisations need to be structured and managed as far as feasible to be socially, culturally, financially, and politically sustainable and to have legitimacy within their constituencies and beyond them;
- However, that does not mean those working with native title holders should see their role as filling out a ‘blank slate’ wish list. True empowerment also requires that the Aboriginal people concerned have access to the full range of possibilities and their entailments, and that they understand these matters. This could be understood as facilitating a process of ‘informed engagement’, of which one component would be informed decision-making;
- It is crucial that those engaged in such work do not use unexamined notions of ‘community controlled’ as the yardstick of good governance principles. While an absolutely core outcome should be control by the native title group of the PBC and how it undertakes its roles, careful attention needs to be paid to how the aspirations of subgroups such as ‘families’ can be met and their particular rights and interests protected (especially Native Title rights and interests, for example where families or other subgroups may have particular connections to specific locales or areas);

- If attention is not paid to such matters, it increases the risk that the PBC will be vulnerable to control by factions of the membership, and in the worst case that the result may be that some native title group are dispossessed from meaningful control over their own lands. More generally, a failure to take account in the design and operations of a PBC of such factors as the distribution of rights and interests across the group's lands, and mechanisms to ensure that there is meaningful participation of all relevant native title holders in decisions about their particular lands, will inevitably compromise the legitimacy of the PBC, and thus its sustainability.
- Finally, there will be situations in which the PBC is only one of a number of organisations of the native title group, or in which they are involved in various ways (for example, agreements with mining companies). It is essential in the design and management of a PBC that attention is paid to this, and that as far as feasible competition between organisations which ultimately aim to serve the same set of Aboriginal people is not intentionally built into the PBC's design and operation.

Relevant common features of Aboriginal 'cultures'

The legitimacy of an organisation like a PBC is essential to its long-term sustainability. Legitimacy can mean many things to Aboriginal people—for example;

- that the organisation's structure takes account of the diversity within its membership or constituency;
- that it is accountable to those members or its constituency and there are mechanisms in place by which their views can be heard;
- that it undertakes its work fairly and equitably;
- that it has good decision-making processes in place;
- that it allocates its resources (human and financial) wisely and fairly; and
- that it can act as a voice for its constituency. In the case of PBCs, legitimacy is further fundamentally linked to the perceptions amongst the relevant native title group that it is undertaking its work in protecting and managing their native title effectively and accountably—including by recognising that there may be particular subgroups with connections to specific locales and areas within the broader determination area.

However, as discussed in more detail below, relying on Aboriginal culture as the principle to ensure that the PBC is 'culturally appropriate' or 'culturally sustainable' and to operationalise the above principles, may actually compromise the legitimacy and effectiveness of the organisation, and thus ultimately its sustainability.

Issues which may arise from common 'cultural' features of native title groups which need to be considered in PBC design, or are likely to be relevant to a PBC's governance, include the following.

Aboriginal 'traditions'/traditional laws and customs

One problem in using an unexamined concept of 'cultural appropriateness' as the guiding principle for the structure and management of a PBC is that it assumes implicitly that Aboriginal 'culture' can provide principles relevant to all aspects of the PBCs management and operations.

As was noted above, it is important that a PBC is setup and operates in a manner which gives it legitimacy amongst the native title group whose title it is managing and protecting. There will be cultural factors specific to that group which will be directly relevant to the aspects of legitimacy discussed immediately above; for example

- decision-making processes concerning country follow the customary and accepted practices of the group;
- there is acknowledgement of such factors as authority structures and gender-appropriate practices in how the PBC operates, most particularly in its management of native title and other matters relevant to country; and
- accountability mechanisms such as consultations and information dissemination are implemented in accordance with the groups customary practices and expectations.

It is also certainly the case that certain kinds of decisions of the PBC must be made in accordance with PBC Regulations 8(3) & 4 and follow a process under traditional laws and customs—if there is a law and custom about that kind of decision; see the attached Aurora Fact Sheet regarding decision-making processes for ILUAs and other native title decisions (Appendix 2, p. 3).

However, there are many other kinds of processes and decision-making which PBCs undertake where close attention needs to be paid as to whether or not ‘traditional’ decision making processes, or more generally the group’s customary ways of operating, are appropriate or applicable. For example, careful thought needs to be given as to whether the customary practices and values of the particular Aboriginal people (that is, aspects of their ‘culture’) would necessarily be appropriate for all aspects of;

- What the CATSI Act terms the ‘internal governance’ of the PBC, that is its corporate governance;
- The PBCs external accountability measures, such as those concerning regulatory compliance which involve reporting to ORIC, and reporting to its funders;
- The PBC’s dealings with resource developers and others who wish to undertake various kinds of activities on the native title lands;
- Financial management, including managing funds which it holds in trust for the native title group.

Later in this Framework, the concept of governance ‘arenas’ is introduced in order to separate out different aspects of a PBC’s operations like those outlined above, which may potentially require quite different governance principles than (for example) are needed for managing the native title itself.

There is another important feature of ‘culture’, and of traditional law and custom, which needs to be taken into account in considering whether it is appropriate to form the basis for PBC governance in all of its governance arenas. In many contemporary Aboriginal groups, what actually constitutes its laws and customs may itself be subject to ongoing negotiation, and indeed what is the relevant tradition may itself be highly contested within the group.

Differences may emerge as to where for example the lands associated with particular family groups lie, or who has the authority to state the content of a particular law or custom, or who is and is not legitimately a Native Title holder. Such differences commonly emerge

during the preparation of the Connection Report and other materials for the claim, and may or may not be explicitly referred to in those materials such that they can get guidance to the PBC. However, once Native Title has been recognised and its management is the sole responsibility of the PBC, such differences and severely compromise the capacity of the PBC to operate. As will be discussed further later, building 'culture' or traditional laws and customs into such governance arenas as the PBC's internal governance may inadvertently build conflict into the heart of the organisation.

Authority and leadership

Typically, within Australian Aboriginal societies in general there is a high stress on personal and local group autonomy and a strong resistance to hierarchy, which challenges an unexamined use of 'the community' or 'the Native Title Group' whose members necessarily perceive themselves as sharing common interests. This stress on autonomy at the individual or local level, along with the ethical and political factors discussed immediately below, establish a distinctive form of Aboriginal 'localism' which in part has deep roots in the classical hunter gatherer societies, although it has been accentuated through the fragmentation resulting from colonisation.

While there was and is considerable diversity across Australian Aboriginal societies with regard to political forms such as authority, in classical Aboriginal societies it lay largely with senior initiated men through their control of religion, although commonly there were specific domains of women's religious and ritual practice which paralleled and were complementary to those of men. However, much of everyday life in the residential and hunting bands was highly autonomous and self-directed; for example, hunting and foraging groups operated in accordance with customary shared values and ways of operating, which ultimately would have been subject to surveillance and sanctions by the senior people whose country it was, not by a group of senior regional 'Elders'.

Equivalently, in the various contemporary situations in which Aboriginal people live, much of everyday life is lived highly autonomously, particularly domestic life including child-rearing and the use and allocation of resources including money and food. Regional 'Elders' have little say in such matters, particularly for younger generations, although they may carry a degree of moral suasion. Thus, such authority as there is typically may not extend beyond the particular kin or family group, and even there does not extend to much of mundane life as discussed.

While there are many Aboriginal groups where there is knowledge of and authority over country amongst senior people, and their roles will be critical in the work of a PBC to manage Native Title and look after country, it can also be the case that there is dissension as amongst (for example) the various family groups comprising the native title group concerning the details of law and custom and who has authority over it, including the authority to 'declare' what it is.

In summary, across the range of matters with which a PBC will have to deal, including its own internal governance, there will typically be different forms of knowledge relevant to these different matters, a range of individuals who may have access to or competence in those various forms of knowledge, and potentially different forms and bases of authority in relation to those matters.

Ethical and political frameworks, obligations and responsibilities

Another manifestation of the 'localism' to be found across much of Aboriginal Australia relates to the significance of kin and family; for many Aboriginal groups, kinship is not just a matter of private familial relationships but provides a fundamental basis for political and economic values and institutions, as well as social ones. The 'families of polity' which anthropologist Peter Sutton has argued are the landed groups across many contemporary Aboriginal societies,³ are not just descent groups which can be seen as linked to their local group antecedents in the classical societies, but also (as Sutton's term suggests) key political units.

One of the reasons for this is that they also establish the set of kin who not only will often share landed identity, but also those to whom its members share the strongest ethical obligations. Within these 'families', an individual's most intense ethical and political links are typically to actual and close classificatory kin up and down the generations such as grandparents, uncles and aunts, nieces and nephews, grandchildren, and particularly siblings, parents and children.

These obligations are 'normative expectations' reflected in such matters as the sharing of resources such as food, money, and consumer goods including vehicles, as well as in support in conflicts and competition between families and the individuals associated with them. The more distant the connections of shared kinship and life experience, the less the ethical and political obligations are likely to be. This can be a particularly significant factor when the native title group have been historically dispersed across a very broad region, with a consequent lack of shared experience and thus familiarity.

This intense political and ethical localism can pose major challenges for the operations of organisations serving a wider group or community, which is the case for PBCs since their key function is the protection and management of the Native Title of all the native title group identified in the determination. These challenges lie at a number of levels:

- Regarding the internal governance of the PBC as a corporation, ethical localism is likely to be inconsistent with the fiduciary duty of Directors and senior staff to act in the best interests of the corporation as a whole, and to avoid conflicts of interest;
- Another challenge relevant to internal governance and arising from ethical and political localism, is that Aboriginal individuals will typically find it difficult to accept a person other than a close kinsman or kinswoman 'representing' them on the Board. The particular difficulties posed by representation are discussed immediately below.
- Ethical and political localism can also compromise the proper discharge of a PBC's statutory obligations to manage Native Title—for example where Native Title rights and interests are held by subgroups across the determination area and there are native title group who would be particularly affected by a proposed future act.

If those whose rights and interests would be particularly affected do not have a representative on the PBC Board and the Board makes a decision on the basis of the Directors' family obligations and not in accordance with the legal obligations of the

³ Sutton, P 2003. *Native Title in Australia: An Ethnographic Perspective*, Cambridge University Press, Melbourne, pp. 206-231

PBC (see Appendix 2), there is a risk that the PBC can impair the native title of particular subgroups rather than protect it.

Ethical and political values and practices such as those sketched in above are key aspects of distinctive contemporary Aboriginal cultures with arguably deeply ancient roots, and failing to take account of them in the design and management of PBCs risks their effective protection and management of native title. They provide one instance of the reason why an unexamined concept of 'cultural appropriateness' should not be adopted the guiding principle for PBCs.

'Representation' and 'representative'

There are two meanings of the term 'representing' relevant to the design and management of PBCs (and other Aboriginal organisations too), but they differ in important ways, and it is a common problem in PBC design that this difference is not given sufficient attention.

The first refers to a subset of a group which can be seen as a 'representative' sample of that group; for example, in the case of a PBC the native title group may decide that the most appropriate structure for their PBC Board is to have a Director from each of (say) the families who make up the group. This could be understood as a means of ensuring that the PBC is seen as legitimate in terms of the Board's structure reflecting a key aspect of the wider group's internal diversity.

However, there is a second sense of the term 'representing' which comes into play here; the PBC and in particular its Board can be seen as representing the Native Title Holders in the management and protection of their native title. In this sense, 'representing' is understood to be the political task of advocating for and the administrative task of managing protecting the rights of the Native Title Holders—and typically, this form of representation is interpreted by Native Title Holders from within the ethical and political frameworks outlined above.

In light of the preceding discussion, key aspects of the Aboriginal 'polity' (political system) bearing on the issue of these two forms of 'representing' relevant to PBCs are;

- There is a high stress on personal and local-group (e.g. 'family') autonomy in Aboriginal groups;
- There is a strong commitment to local kin groups such as 'families', and identity (often including landed identity) is established through them. An individual's most intense ethical obligations typically are to close kin within his or her 'family';
- Given these factors, it is unsurprising that there is often deep suspicion of others who are not close and trusted kin 'representing' and speaking for one's interests and those of one's group, since those interests are not seen as his or her business. Consequently, the concept of 'representation' can itself be seen as non-legitimate;
- This perceived lack of legitimacy of the structures of representation, such as the composition of a Board, can be exacerbated when the decisions of a Board are seen as favouring one set of interests, e.g. particular families, and ignoring the interests of others;

- These factors can lead to the ‘politics of representation’,⁴ where strategies such as ‘stacking’ meetings of the corporation such as Annual General Meetings can lead to particular families controlling the Board.

Nonetheless, ‘representing’ (in both its meanings) is fundamental to a PBC’s governance, both its internal governance and how it undertakes its functions, most particularly managing and protecting Native Title. One crucial observation arising from the above discussion, which will be addressed later in this Framework document, is that the work of incorporating into the operations of a PBC the diversity amongst the native title group, including potentially differentiated rights and interests across the determination area, should not simply be left to having a ‘representative’ Board structure.

Such a structure may well be necessary as one important mechanism by which legitimacy of the PBC is established amongst the native title group. However, as will be discussed further below the real work of reflecting internal differentiation should be done through how the PBC actually conducts its functions, most importantly those pertaining to protecting and managing country and the group’s Native Title, rather than through the internal governance of the PBC.

Moreover, establishing a Board structure to reflect complex internal structures such as ‘families’ has to be understood as a form of ‘codification’ of customary values and practices, as discussed previously, and any unintended consequences arising from this codification need to be identified and considered.

Meetings and Aboriginal political processes

Formal and informal meetings and public gatherings play a significant role in contemporary Aboriginal social and political life, and have deep roots in the classical systems. Indeed, as the anthropologist Fred Myers has shown for Pintupi people, in many ways meetings actually *create* a temporary polity.⁵ In particular, meetings can provide forums where public ratification of events or decisions can be made. These can be seen as forming what Peter Sutton terms a ‘jural public’—a gathering of those including senior people from the relevant communities and families or other kin groups whose participation and assent is required in the particular matter.⁶

Even so, as Myers also observes, the Aboriginal participants of a meeting may not necessarily feel bound by ‘decisions’ made at each; people may seek to preserve their own and their family’s autonomy by (for example) saying that the meeting was not representative, or that it did not include key members of their own group. It is also not uncommon for people to use a form of strategic disengagement, in which they do not attend a meeting in order to maintain their own position on an issue.

Moreover, experience shows that meetings can also provide forums which aspiring politicians can use in their attempts to gain status, and which individuals may use to air grievances or to compete for influence and status or for access to resources, and where tensions amongst individuals or families are given a public airing. Such factors can pose a

⁴ Mantziaris and Martin 2001, pp. 303-305 (full reference at footnote 2)

⁵ Myers, F 1986. ‘Reflections on a meeting: Structure, language, and the polity in a small-scale society’, *American Ethnologist* 13: 431-447.

⁶ Sutton 2003, p. 188 (full reference at footnote 3)

risk that large meetings, which involve significant human and financial resources to organise, can be derailed and so fail to provide the sought-after outcomes.

Thus, while meetings are an essential component of the processes of information dissemination and decision-making, there are issues to consider in determining their place in a given consultation process:

- To be legitimate and sustainable, decisions typically require involvement from a wide range of those who may hold or assert interests in the matter. 'Entitlement', not knowledge or merit, it is usually prioritised;
- Typically, the legitimacy of the *process* of decision-making is seen as being just as important as any outcomes;
- Who has the authority to make decisions or be involved in decision-making can itself be subject to dispute, and this may require careful negotiation, and the commitment of time and resources;
- Importantly, meetings rarely provide appropriate contexts for quality information dissemination, particularly when it concerns complex or controversial matters; that is, if possible they should not be sole means for ensuring 'informed consent' to a particular proposal.

Ideally, taking into account the factors which have been discussed thus far, the most effective process to ensure informed decision-making by those who are held to be the appropriate decision-makers:

- first conduct a series of small-scale participatory information sessions, e.g. at the family group or household level, at which care is taken to ensure that those present fully understand the nature of the proposal being put forward;
- the general views of those present on the proposal are sought, but it is made clear that no decision has been asked for, and there will be a separate decision-making stage involving all those with a right to be present;
- it is made clear that exactly the same information is being given to each group, and at the end of each consultation those present are asked if they are willing for their general views to be passed on to others;
- an explicit aim of this process is to seek to establish whether it is possible to develop a general consensus on the project, and where it seems appropriate to progressively feed in the views gathered in these small-scale consultations as part of the process of building up this consensus;
- at the end of this process, a meeting (whether of representatives nominated from relevant subgroups or of the wider group) would be held to constitute the 'jural public' as outlined above to formally ratify what ideally would be a consensus reached through the earlier information dissemination and consultation processes.

One of the barriers to such a 'ground-up' process is that it could be argued as being potentially too expensive, given the limited human and financial resources available to NTRBs and NTSPs or even more to the PBC. There is no doubt that financial considerations have to be factored in to decisions as to which consultation process can be undertaken. On the other hand, meetings themselves are often extremely expensive, and the failure to gain

committed support from all those with potential interests in a matter can ultimately lead to the need for expensive further consultations to be undertaken.

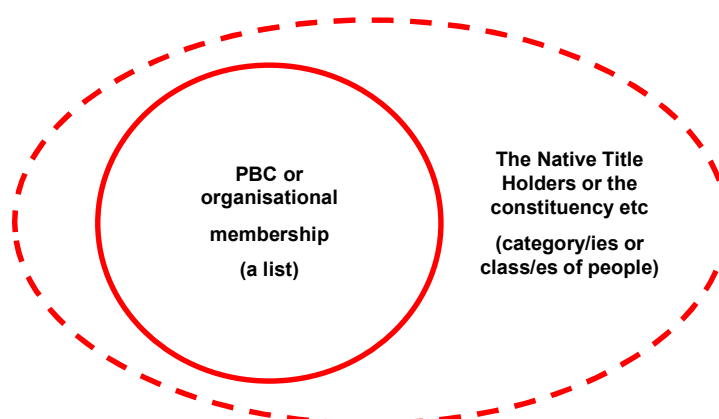


Figure 1: Membership of a PBC vs membership of a native title group

There is a further important point to be made about meetings, most especially those concerned with decision-making. It is not at all uncommon for the membership of the PBC to be treated as if it is the same as that of the Native Title group recognised in the particular determination.

However, for both practical and theoretical reasons these two sets of people can never be the same, and thus meetings of a PBC's membership (e.g. an AGM) are not equivalent to meetings of the native title group.

This is illustrated in Figure 1 above. The PBC members are the owners of the corporation and have defined legal rights and obligations as such pertaining to the corporation (such as the right to vote at Annual General Meetings on the business of the corporation). Apart from a PBC's founding members, its membership is comprised of those who have applied for membership of the PBC and whose applications have been accepted by the Board in accordance with the Rules of the PBC.⁷ That is, the membership of the PBC comprises a list of eligible people who have been accepted through an administrative process operated by the Board.

Who comprises the native title group on the other hand is in essence established by the relevant traditional laws and customs, and is recognised by the particular Native Title determination. The membership of this native title group is a *category* of people, not a *list* like the membership of the PBC. There can be a whole set of both practical and political reasons why the two memberships will not correspond.

For example, it may be impractical for the PBC managing the Native Title for a group whose membership is widely dispersed to organise applications for PBC membership to be made available to, and returned, by every Common Law Native Title Holder. There may also be political reasons; while as referred to previously there can be a 'politics of representation' with regard to the composition of a PBC Board, it is also not uncommon for there to be a 'politics of exclusion' regarding PBC membership, in which a Board will not accept applications for membership from those entitled to be members, or will cancel the

⁷ see Appendix 1, pp. 7-11

membership of individuals, because of conflict between families over the legitimacy or otherwise of an asserted landed identities.

Governance and decision-making

Governance refers to the process through which a group or community establishes its goals and priorities collectively as a people, as families, and as individuals, and allocates resources to realise those goals and priorities. In the case of Aboriginal groups, governance encompasses such matters as:

- The bases on which legitimate authority, as well as responsibility and accountability are established within the group, and how they are to be implemented;
- What constitutes cultural knowledge, who has authority over it and how it is managed and transmitted, including intergenerationally, backspace;
- How the group manages its own internal social, political and economic relations, and those with the wider society;
- How social, cultural, and financial and other material resources are to be allocated;
- Who makes decisions, about what, and in what contexts.

Thus, decision-making is just one aspect of governance, albeit one which is relevant to all its aspects.

This Framework document proposes that ‘cultural appropriateness’ is not of itself a useful or effective principle on which to base PBC governance. Furthermore, it proposes that PBC governance cannot be usefully understood as operating in a separate and distinct Aboriginal domain, and that these matters will be discussed in the following sections.

Beyond ‘cultural appropriateness’ 1: governance ‘arenas’

For an organisation to be held as legitimate by the Aboriginal people it serves, it must be sensitive to their values and norms in the key issues for which it provides a service. Factors relevant to a PBC’s establishing its legitimacy with the native title group have been outlined on page 4 above. It is often said that Aboriginal organisations need to be ‘culturally appropriate’. However, as outlined earlier, relying on Aboriginal ‘culture’ as providing all the principles necessary to ensure that a PBC is ‘culturally appropriate’ or ‘culturally sustainable’, may actually compromise the legitimacy and effectiveness of the organisation, and thus ultimately its sustainability.

For this reason, it is useful to break down organisational governance into different domains or ‘arenas’, and consider what the most effective and appropriate principles would be for each of them, and the role (or otherwise) of Aboriginal ‘culture’ in each arena.⁸ Each ‘arena’ involves different forms of governance for a given organisation; for example:

- The various arenas may entail or require diverse kinds of authority, with different bases to that authority;
- The various arenas would likely each require particular kinds of knowledge and skills;

⁸ The concept of governance ‘arenas’ is discussed at some length in Martin, Bauman and Neale 2011, pp. 13-16 (see full reference in footnote 1).

- The processes of governance in the various arenas would potentially be undertaken in quite diverse geographic and social contexts, and require the involvement of quite different kinds of people;
- The various arenas would normally have widely differing matters about which decisions have to be made;
- Given the above factors, there would usually be a range of decision-making processes across the various arenas;
- The various arenas would likely have significantly differing accountability and legitimacy requirements, and different accountability constituencies;
- Governance principles in some arenas would be largely determined by legal and administrative requirements, while others may be conducted in accordance with informal or customary expectations;

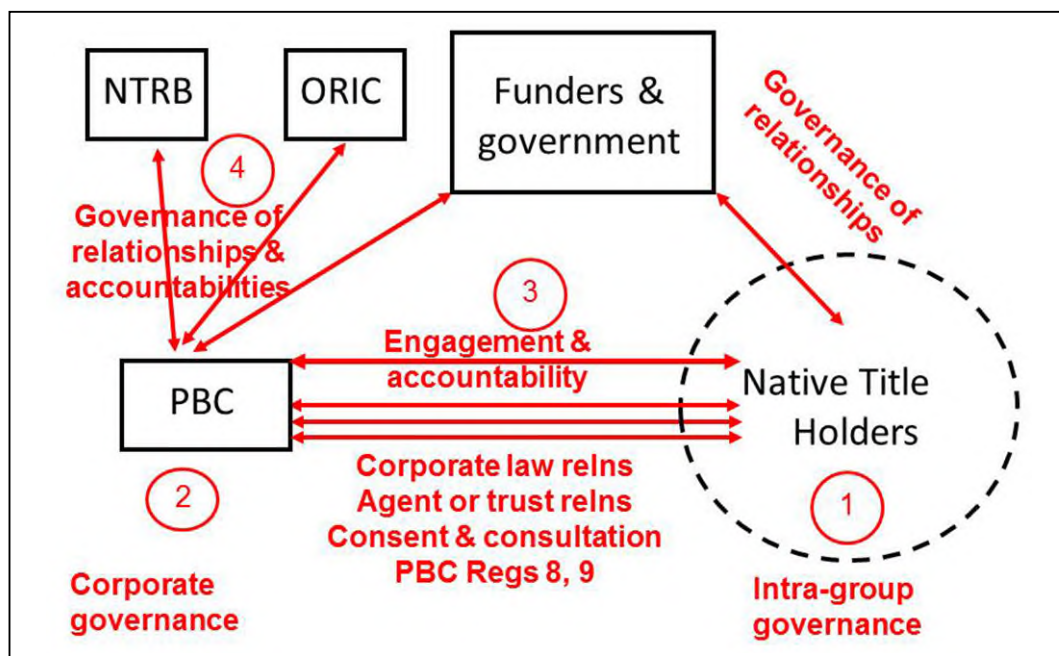


Figure 2: PBC governance 'arenas'

Some specific examples of different governance arenas relevant to PBC operations are:

- Reporting on grant funds, which would normally be the provenance of management (Arena 4);
- Decision-making by the Directors and senior management about the use of moneys held in trust by the PBC for the native title group (Arenas 2 and 3).
- Dealings such as Future Acts which may impact on Native Title, which depending upon the options ultimately agreed to by the native title group may need to be made in accordance with any applicable traditional law and custom (Arena 3);
- Managing cultural heritage issues on the Native Title lands, operating a Ranger service, issuing permits for visitors, and a multitude of other activities which Aboriginal people across Australia are undertaking on their lands (Arena 3).

- Decision-making about operational matters or financial expenditures, which would normally involve decisions by senior management or Directors. Such matters come under the purview of the CATSI Act, and involve such principles as fiduciary duty) (Arena 2);
- Conducting Special General and Annual General Meetings, or considering PBC membership applications (Arena 2).

The concept of governance ‘arenas’ is not intended to provide a model of PBC organisational structures. Rather, it aims to focus close attention in the design and management of PBCs on the range of contexts in which PBC governance is conducted concerning such matters as how and by whom authority is exercised, resources committed, consultations held and decisions made. Understanding that PBC governance is conducted across diverse ‘arenas’ means that careful attention needs to be paid to such matters as:

- Clarifying an issue of absolutely fundamental importance to PBCs, which is that the governance mechanisms for managing the corporation (including its rules for membership and its AGMs and other meetings)—its internal governance—should not be conflated with those for managing both the lands over which Native Title has been determined and the Native Title itself;
- Whether, and if so how, the governance arrangements in each arena need reflecting in the Rules of the PBC (where they would be subject to the purview of ORIC), or some ancillary organisational document such as a Procedures Manual, or would be better left to informal mechanisms (although this carries with it its own attendant risks), or some mix of these elements.
- Capacity building for PBC Directors and members needs to move beyond a ‘working in two worlds’ model such as that promoted by ORIC, to provide a deeper understanding of the entailments of each arena for good management and decision making;

Beyond ‘cultural appropriateness’ 2: PBCs as ‘intercultural’ institutions

Earlier on page 3, the anthropological concept of ‘intercultural’ was introduced to describe the nature of the intersection between contemporary Aboriginal people’s own values and practices and those of the wider society. This cannot be simply cast as operating in ‘two worlds’.

This is because Aboriginal life worlds, including the values and practices which are relevant to governance, are themselves ‘intercultural’—drawing not only on the classical traditions of Aboriginal pre-colonisation societies, but also **on the** values and practices of the broader Australian society, through an ongoing process of engagement with that broader society. For this reason, Aboriginal values and practices, including those which might be thought of as customary, are not fixed or immutable but are undergoing constant reinterpretation and transformation. This cannot be understood as simply either ‘loss’ or ‘continuity’ of culture.

This is not to deny that there are distinctive Aboriginal histories, beliefs, values and understandings, and practices—after all, a determination of Native Title involves the legal recognition of a distinct corpus of traditions and customs concerning people’s connections to country. However, it is to challenge the notion that Aboriginal ‘culture’ or customary practices can usefully be understood as lying in a completely separate domain from that of

the dominant society. Governance of Aboriginal organisations in the terms outlined here is usefully understood as intercultural—perhaps above all others for PBCs since the Native Title they manage is quintessentially intercultural in its character.

PBC governance is intercultural does not mean that all arenas are intercultural to the same degree. For example, while there will be aspects of a PBC’s internal governance (Arena 2) which will continue to be distinctively Aboriginal, such as the contexts and many of the protocols associated with AGMs, much of this arena is heavily determined by the requirements of the CATSI Act.

On the other hand, while there are important elements of the relationship between the PBC and the native title group (Arena 3) which are also determined by the law, such as those pertaining to the obligations of the PBC as either an agent managing the Native Title or a trustee holding it, there are other elements which would be guided by at the least conventionally accepted or customary practices such as how and where feedback, consultations and so on are undertaken, particularly those concerned with managing the lands over which Native Title has been determined.

With respect to dealings with Native Title (unless alternative provisions have been agreed to by the native title group) or the issuance of an ILUA, there is a legal requirement under s.251 of the NTA and PBC Regulations 8(3) & (4) for decision-making to be in accordance with traditional law and custom, if there is law and custom pertaining to that matter. Even here however, as an example of the intersection of Australian law and Aboriginal laws and customs, s.251 and the PBC Regulations enable the native title group to agree to a process to be followed decision-making about these matters if there is no traditional process.

‘Intercultural’ is a technical anthropological term, but it is of practical as well as theoretical significance in the design of PBCs and other Aboriginal organisations. Practical implications for PBC design and management include:

- It emphasises the need to not rely on stereotypes of Aboriginal ‘culture’ as a guiding principle for all aspects of PBC governance;
- It allows governance mechanisms drawn from best practice in other organisations, including other Aboriginal organisations, to be incorporated into the various PBC governance arenas, without having to pass a litmus test of cultural authenticity;
- It provides a better basis for informing the process of participatory design of a PBC with the native title group, through honest and informative discussions around appropriate governance mechanisms which serve their contemporary aspirations and facilitate organisational sustainability.

Kinds of decision making

This section outlines the different kinds of decisions which would be made various governance arenas. This is a summary account only, and further details are provided in Appendix 1 (concerning internal PBC governance, Arena 3) and Appendix 2 (concerning governance of the relationship between the PBC and the native title group, Arena 2).

Decision making in Arena 1: the native title group

Decision-making in Arena 1 can be seen as operating in accordance by ‘traditional laws and customs’ for certain native title purposes, and with both customary and informal ways of doing things for others—for example, ‘Yamatji way’ or ‘Blackfella way’. Instances are:

- The mob’s own business—family business, Law business, country business, family and personal business, and so forth;
- How important locales and areas are managed, including protocols for accessing and using them by the native title group themselves and by outsiders;
- How funeral ceremonies and other important events are managed;
- How disputes are managed (both amongst the native title holders themselves, and between them and others in the region);
- How children are raised, and the options for their landed identities actualised;
- How social and kinship relationships are managed.

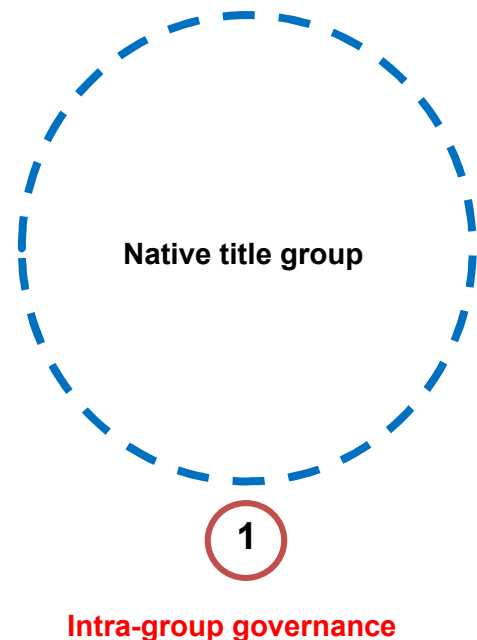


Figure 3: Arena 1 – Intra-group governance

Decision-making in Arena 2: Internal governance of the PBC

Arena 2 can be thought of as corporate governance, or what the CATSI Act refers to as ‘internal’ governance. It basically relates to the way in which the PBC manages itself as a corporate entity. At the heart of internal governance are the requirements of the CATSI Act, which in turn reflects those of the Corporations Act, and the common law.

- The PBC’s own Rule Book (‘constitution’) is important for the internal governance of the PBC; e.g.
 - Who can become members of the PBC, and how they apply to do so;
 - Their rights as members (set out in the CATSI Act as well as the Rule Book)
 - How the PBC is to be run;
 - Who can become Directors, and how they get elected;
 - Rules for PBC meetings of its members (e.g. the AGM, Special meetings, etc)
 - Financial management rules.

These matters are set out in detail in the *Guide to writing good governance rules for prescribed bodies corporate and registered native title bodies corporate*, produced by ORIC and attached at Appendix 1. Reinforcing the importance of the conceptual framework of different governance arenas, ORIC’s *Guide* has almost nothing to say about how the RNTBC is to manage the native title, although in Schedule 2 of the *Guide*, Regulations 8 and 9 are

briefly summarised. This reflects ORIC’s statutory role of regulating the corporation, not its management of the native title.

It should be noted that alternative consultation processes can be established under PBC Regulations 8(1)(d) and 8A for making decisions about dealings in Native Title, but any such alternative process must be set out in the PBC’s Rules.⁹ This can be thought of as an example of the codification of customary decision-making, and as device which links aspects of Governance Arenas 2 and 3.

Also, there are other management matters are dimensions of its internal governance but which lie outside the CATSI Act and may be subject to other laws (e.g. those pertaining to employment, and occupational health and safety). While some of these may not be relevant to smaller PBCs, larger PBCs may well need to develop ‘Human Relations’ policies, staff selection criteria, Enterprise Bargaining Agreements, and the like.

Decision-making in Arena 3: Working for the native title group

This arena concerns the fundamental roles and statutory functions of the PBC—how it works for the native title group, most particularly in managing and protecting its native title, and more generally managing its lands, as well as the whole gamut of its relationships and interactions with the native title group. As has been discussed previously, it is not at all uncommon in the design and management of PBCs for not enough attention to be given to these processes, in comparison with the governance of PBC itself (Arena 2).

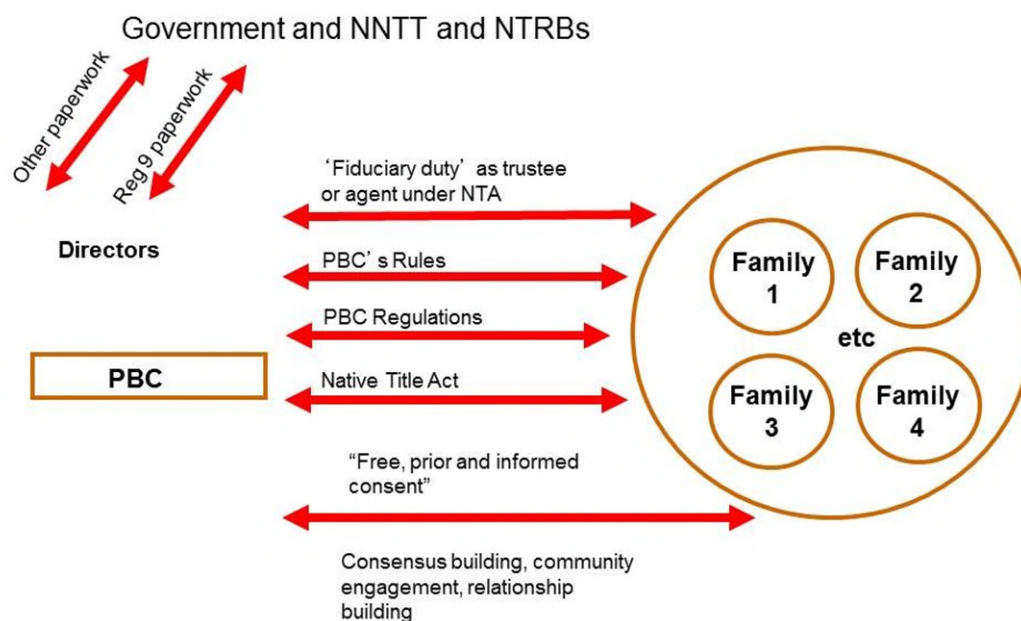


Figure 4: Arena 3 – working for the native title group

It is important to put considerable work into establishing and supporting effective and sustainable governance of all aspects of a PBC’s relationship with the native title group. The legitimacy or otherwise of the PBC vis-a-vis its constituency, the native title group, will in large part be determined by how effectively the PBC conducts its affairs in Arena 3. As

⁹ see Appendix 2, p.3

Figure 4 indicates however, this is a very complex arena which includes legal requirements (arising from the NTA as well as other statutes, trust law, the PBC's Rules, the common law, etc), as well as aspects of the relevant body of traditional laws and customs, and customary practice. This complexity is precisely why greater attention needs to be paid to this Arena.

Some of the most important matters in Arena 3 concern 'native title decisions'—defined in the NTA as decisions to surrender native title, or to do something (or agree to do it) that would affect the native title. A key issue for a PBC is how best to implement 'informed consent' in both native title dealings (as required by the PBC Regulations) and in other land-related activities (such as cultural heritage management), and how to maintain good communications with the native title group.

As well as formal native title decisions, PBCs may be making a wide range of decisions about country, depending on their circumstances such as the environmental features of the lands concerned, and the tenures over it; for example:

- Responding to mining exploration permit applications;
- The conduct of heritage surveys for mining exploration etc;
- Decisions about the work of their Ranger group;
- Issuing visitors permits for accessing or traversing the lands;
- Managing social and economic ventures on country

For all these decisions, the PBC should ideally be assisted to develop processes to ensure informed consent is given by the relevant native title holders.

Summary: Implications for supporting PBCs

The following provides a set of summary principles for both establishing and supporting Aboriginal organisations and their governance (not just PBCs) which emerge from the discussion in this Framework document:

- Do not put all the work of engaging with the native title group, most particularly decision-making regarding native title dealings, into the internal governance of corporation itself;
- Do not put all the work of establishing cultural legitimacy, or of reflecting the diversity within the native title group, on a 'representative' Board structure or 'classes' of membership—they cannot reflect the full extent of such diversity, even though this is the focus of much of the Aboriginal 'politics of representation';
- Do put considerable work into establishing and supporting governance of the relationship between the organisation and its constituency—for a PBC on how best to implement 'informed consent' in both native title dealings (as required by the PBC Regulations) and in other land-related activities (such as cultural heritage management), and how to maintain good communications with the native title group;
- More generally, be alert to both the pros and cons of attempting to incorporate 'laws and customs', 'traditions' or 'culture' into corporate structures, the Rules and processes. Doing so can risk:
 - 'codifying' laws and customs traditions, and culture, and thereby subjecting them to regulatory scrutiny;
 - Distorting those laws, customs and traditions;
 - Because their specificities and who has authority in relation to them can be highly contested in some groups, incorporating laws, customs and traditions into organisations structures and rules can bring instability and conflict into the heart of the organisation.
- However, where there is a high degree of contestation within a group (e.g. in a native title claim with endemic internal conflict), it may create more sustainable organisational governance to codify certain matters of law and custom by getting 'once-off' agreement on them which then limits subsequent opportunistic actions. For example;
 - Adopting Alternative Consultation Processes in accordance with PBC Regulations 8(1)(d) and 8A concerning dealings in native title apart from ILUAs and right-to-negotiate agreements.¹⁰
 - Negotiating and registering an intra-Aboriginal ILUA, for example concerning agreed internal boundaries and 'shared country' areas between families or language groups, or which subgroups will conduct heritage surveys over which areas;

¹⁰ see Appendix 2, p.3

- In the conduct of ‘community’ activities or social or commercial businesses (e.g. Rangers, or a cattle enterprise, or a cultural tourism business) across lands associated with multiple local groups, so that the enterprises are less vulnerable to short-term political interventions or rent-seeking;
- Acknowledging the resource implications, if possible, avoid establishing ‘community’ meetings, AGMs etc as the sole mechanisms for engagement between a PBC and its constituents—or between NTRBs/NTSPs and their constituents
- As far as possible, use smaller (e.g. family group) discussions to provide information and build up consensus ahead of a community meeting which can act as the ‘jural public’ in ratifying and giving legitimacy to that consensus;
- Those working with native title holders should not write themselves out of the script as just ‘facilitating’ or ‘taking instructions’—they are change agents in a shared intercultural space with the Aboriginal people concerned in developing a Native Title claim and in establishing the PBC and other institutions after the determination of that claim. It is important to recognise and manage the ethical and political implications of being in that space, rather than euphemising them.
- Do not hide behind ‘cultural appropriateness’ as a one-size-fits-all approach to setting up and working with Aboriginal organisation—be alert to the implications of different governance ‘arenas’ and their political and cultural entailments.



Australian Government

Office of the Registrar of Indigenous Corporations

APPENDIX 1

A GUIDE TO

WRITING GOOD GOVERNANCE RULES

for prescribed bodies corporate
and registered native title
bodies corporate

‘Know your rules.’

Encourage your members to learn about the rules of your corporation.



Australian Government

Office of the Registrar of Indigenous Corporations

A GUIDE TO **WRITING GOOD GOVERNANCE RULES**

**for prescribed bodies corporate
and registered native title
bodies corporate**

‘Know your rules.’

Encourage your members to learn about the rules of your corporation.

Further help

ORIC runs workshops for new groups wanting to register and for existing corporations who want to change their rules. Freecall 1800 622 431 (not free from mobiles).

Disclaimer of liability

This document is provided for guidance only.

This guide will help corporations registered under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* to develop a rule book. It is not legal advice and ORIC disclaims any liability arising from its use. People using this document may seek further assistance from ORIC or obtain other professional advice.

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Introduction

The Office of the Registrar of Indigenous Corporations (ORIC) has prepared the Rule Book Info Kit to help Aboriginal and Torres Strait Islander people develop an appropriate set of rules when they set up a corporation under the *Corporations (Aboriginal and Torres Strait Islander Act) 2006* (CATSI Act).

A registered native title body corporate (RNTBC) is a prescribed body corporate that has been registered on the National Native Title Register.

A prescribed body corporate (PBC) is a group that holds and manages native title rights.

This good governance guide complements the Rule Book Info Kit. It will assist Aboriginal and Torres Strait Islander people who are setting up a prescribed body corporate (PBC) that is to become a registered native title body corporate (RNTBC) under the *Native Title Act 1993* and the Native Title (Prescribed Body Corporate) Regulations 1999 (PBC Regulations). It will also assist native title holders who are amending the rules of their existing PBC or RNTBC to comply with the CATSI Act.

Scope of this guide

This guide:

- provides information about some of the important matters you need to consider when setting up your PBC or writing rules for it
- sets out some of the options that may be available under the CATSI Act and the Native Title Act to tailor your rules to suit your particular circumstances
- provides some example rules that you may want to include in your rules.

While the Native Title Act and PBC Regulations refer to both 'prescribed body corporate' and 'registered native title body corporate', the CATSI Act only refers to a 'registered native title body corporate' or 'RNTBC', and does not use the term PBC. Throughout most of this guide we have used the term 'PBC' to include both a prescribed body corporate and a registered native title body corporate, as 'PBC' is the term that most native title holders are familiar with.

How to use this guide

We recommend that you use this guide together with the Rule Book Info Kit when you are developing new rules for your PBC or changing your existing PBC rules to comply with the CATSI Act.

Remember that many of the rules for a PBC will be the same as for other Aboriginal or Torres Strait Islander corporations. However, your PBC will need to have some extra rules that are not set out in the Rule Book Info Kit. These are about native title matters that your PBC has to deal with under the Native Title Act. In this guide we explain why you need these rules, and we give some examples for you to use or change for your PBC.

There are also a number of rules in the Rule Book Info Kit that you may need to change to suit your PBC. Again, this guide explains them and gives examples.

This guide only identifies the rules in the Rule Book Info Kit that you may need to change for a PBC. It does not refer to rules that are likely to be the same for all Aboriginal and Torres Strait Islander corporations.

Steps to take

1 Read through this guide to learn about the extra rules or changes that you may need to make for your PBC.

2 In this guide, the numbers on the left hand side of the pages correspond to the numbers used for the rules in the Rule Book Info Kit. Make a note of these rules, so that you will know which ones you will need to change or add to in the Rule Book Info Kit. The most important rules that you will need to look at are:

Rule 1	Name
Rule 2	Dictionary and interpretation
Rule 3	Objectives
Rule 4	Powers of the corporation
Rule 5	Membership of the corporation
Rule 7	Annual general meetings and general meetings
Rule 8	Directors of the corporation
Rule 9	General duties of directors
Rule 10	Functions, powers and duties of directors
Rule 11	Directors' meetings
Rule 14	Finances and recordkeeping
Rule 17	Dispute resolution process
Rule 20	Amendment of the constitution
Schedule 1	Determination of native title
Schedule 2	Native title decision—consultation and consent

3 Prepare the rules for your PBC using the Rule Book Info Kit as the basis for your rules. When you come to one of the rules noted in this guide, use the information and example rules contained in this guide to help you change or add to the rules in the Rule Book Info Kit in a way that is right for your PBC.

4 We encourage you to carefully consider how you write your rules. Remember to keep in mind the specific terms of your native title determination and your unique social and cultural circumstances, as well as the requirements of the CATSI Act and the Native Title Act.

Training and assistance for corporations

ORIC provides training for corporations registered with the office, and includes corporation-specific training, non-accredited and accredited training.

The corporation-specific training is offered to Indigenous groups who want to register with the office and includes:

- what registering a corporation actually means
- the costs, benefits and legal responsibilities involved
- whether registering as a corporation is required or necessary for your group
- the key features of registering under the CATSI Act
- other options for registering under state or federal law
- how to develop a good corporation rule book.

The corporation-specific training also includes design and re-design of the corporation's rule book (constitution), roles and responsibilities of directors, holding an annual general meeting and other meetings, and other corporate governance matters.

ORIC also offers the 'Managing in Two Worlds' suite of training, which includes the non-accredited Introduction to Corporate Governance training and accredited training through a Certificate IV in Business (Governance) for suitable participants. This training program was specifically developed for people who wish to attain skills operating in Indigenous organisations.

For more information on corporate governance training please call ORIC on freecall (excluding mobiles) 1800 622 431.

Disclaimer of liability

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The rule book

Rule 1

Name

CATSI Act s.85-1(3) requires that a corporation must have one of the following sets of words as part of its name:

- Aboriginal corporation
- Torres Strait Islander corporation
- Aboriginal and Torres Strait Islander corporation
- Torres Strait Islander and Aboriginal corporation or
- Indigenous corporation;

The name of a corporation must include certain words in its name to show that it is an Aboriginal or Torres Strait Islander corporation.

If the Federal Court formally determines a corporation to be a PBC it will then be registered on the National Native Title Register and will become known as a registered native title body corporate (**RNTBC**).

Once a corporation has become an RNTBC it must also include the words **registered native title body corporate** or the abbreviation **RNTBC** as part of its name—CATSI Act s. 85-1(4).

The corporation must notify ORIC within 28 days of becoming registered on the National Native Title Register and the Registrar will change its name to include the words ‘registered native title body corporate’—CATSI Act s. 85-10(1) and (2)(a).

The Registrar will also include these words in a corporation’s name if it becomes aware that a corporation has become a registered native title body corporate—CATSI Act s. 85-10(2)(b)—for example, if the National Native Title Tribunal notifies the Registrar that the PBC has been entered on the Register.

Rule 2

Dictionary and interpretation

For a PBC it may be appropriate to include the following extra definitions in the dictionary:

common law holders has the same meaning as in s. 56(2) of the Native Title Act, and means the persons included in the determination of native title as the native title holders.

determination of native title means the determination of the Federal Court of Australia in the proceeding known as
No of 20.....

determination area means the land and waters the subject of the determination of native title and in relation to which the corporation is registered on the National Native Title Register.

National Native Title Register means the register established and maintained under part 8 of the Native Title Act.

Native Title Act means the *Native Title Act 1993 (Cth)*.

native title decision has the same meaning as in regulation 8(1) of the PBC Regulations and means a decision:

- (a) to surrender native title rights and interests in relation to land or waters or
- (b) to do, or agree to do, any other act that would affect the native title rights or interests of the common law holders.

native title holders means being the persons determined by the Federal Court as holding the common or group rights comprising native title in the determination area.

native title legislation obligations means the following obligations imposed by the Native Title Act and the PBC Regulations on a registered native title body corporate:

- (a) an obligation to consult with the common law holders of native title
- (b) an obligation to act in accordance with the directions of the common law holders of native title
- (c) an obligation to act only with the consent of the common law holders of native title
- (d) an obligation to take any other action in relation to the common law holders of native title.

native title rights and interests has the same meaning as in s. 223 of the Native Title Act.

NTRB (native title representative body) means a representative Aboriginal/Torres Strait Islander body that is recognised under s. 203AD of the Native Title Act.

PBC Regulations means the Native Title (Prescribed Bodies Corporate) Regulations 1999 (Cth).

prescribed body corporate or PBC has the same meaning as regulations 3 and 4 of the PBC Regulations.

registered native title body corporate or RNTBC has the same meaning as in s. 253 of the Native Title Act.

Rule 3 Objectives

Referred to as the corporation's 'objects' in s. 66-1(2) of the CATSI Act.

The objectives of the corporation must be carefully considered. They should be broad enough to cover all activities that the corporation and its members may want to undertake.

Note that an act of the corporation is not invalid merely because it is contrary to or beyond the scope of the objectives—CATSI Act s. 72-10. However, directors who authorise actions that are not covered by the corporation's objectives may be in breach of their duties.

The PBC Regulations require that a corporation that is to become a PBC must be incorporated—that is, if the corporation is seeking a s. 56 or 57 determination under the Native Title Act and becoming a registered native title body corporate—PBC Regulation 4(1) and 4(2)(b).

Section 56 of the Native Title Act provides that the Federal Court must make a determination whether native title is to be held in trust by a PBC nominated by the native title holders, or whether native title is to be held by the native title holders themselves. If it is the former, the court must determine under s. 56 that the PBC is to hold the native title rights and interests in trust for the native title holders.

Section 57 of the Native Title Act provides that if the Federal Court does not make a determination that native title is to be held in trust, the court must still determine which PBC is to carry out the functions of an RNTBC. Rather than being a trustee, such an RNTBC is to act as agent or representative of the native title holders.

Therefore, a PBC should have the following ‘native title’ objectives (as well as any other cultural, social, commercial or charitable objectives).

Native title objectives

The objectives of the corporation are to:

- be the subject of a determination under s. 56 or s. 57 of the Native Title Act
- carry out the functions of a prescribed body corporate
- become a registered native title body corporate and carry out its functions.

The PBC Regulations also specify other important statutory functions—PBC Regulations 6 & 7—that should be included in the native title objectives:

- to hold the native title rights and interests in trust for the common law holders (when the PBC is a trustee)
- to manage the native title rights and interests of the common law holders (when the PBC is a trustee)
- to act as agent or representative of the common law holders in matters relating to the native title rights and interests (when the PBC is an agent or representative)
- to manage the rights and interests of the common law holders as authorised by the common law holders (when the PBC is an agent or representative).

Statutory functions

The PBC Regulations also set out extra statutory functions that apply to both a trustee and an agent PBC— PBC Regulations 6 & 7. You may wish to include these in your rules so that native title holders are aware of them. These functions of the corporation are:

- to hold money (including payments received as compensation or otherwise related to the native title rights and interests) in trust
- to invest or otherwise apply money held in trust as directed by the common law holders
- to consult with and obtain the consent of the common law holders in accordance with regulation 8 of the PBC Regulations before making a native title decision (see Schedule 2)
- to perform any other function relating to the native title rights and interests as directed by the common law holders.

Without limiting these functions, to perform its functions the corporation may, on behalf of the common law holders:

- consult other persons or bodies
- enter into agreements
- exercise procedural rights—Native Title Act s. 253
- accept notices required by any law of the Commonwealth, a state or a territory to be given to the common law holders.

Non-native title objectives

An important decision that native title holders need to make is whether the objectives of their PBC should extend beyond carrying out the native title functions set out in the PBC Regulations.

In some instances, native title holders may see their PBC as a way of exercising their traditional authority on a range of matters. If you want your PBC to make and implement decisions on cultural, social, economic and political matters, you will need to include this in your corporation's objectives.

However, if you want to undertake other activities, especially commercial activities, it may be more appropriate to set up separate legal bodies and structures. This allows the PBC to focus on carrying out its native title functions and to insulate itself from the risk of financial loss and insolvency.

Choice between a trustee PBC and an agent/representative PBC

Under the general law there are significant legal differences between the duties of a corporation acting as trustee and a corporation acting as agent or representative. However, the trust or agency functions of a PBC are created under the Native Title Act and the PBC Regulations, and it appears that the differences between them may be less significant than they would be under the general law. However, the courts are likely to analyse and interpret the nature and scope of the trustee and agency functions and obligations in the context of the general law.

See the discussion in C. Mantziaris & D. Martin, *Native Title Corporations: a legal and anthropological analysis* (Federation Press, Sydney, 2000) ch. 5.

Statutory functions

The PBC Regulations require both trustee and agent PBCs to consult with native title holders and obtain their consent in the same way when they are making a native title decision. Both are required to deal with money held in trust as directed by native title holders, and to perform any other function relating to native title rights and interests as directed by native title holders—PBC Regulations 6 & 7.

Possible areas of difference

One possible difference between a trustee and agent PBC is whether in some circumstances a trustee PBC has a duty to exercise its own independent judgment in

See the discussion in Mantziaris & Martin, p. 158.

Although the rules of a PBC are likely to provide that its members are not liable for its debts, there is a possibility that native title holders (in their capacity as 'principal') could become jointly and severally liable for the liabilities of their agent PBC in certain circumstances. See Mantziaris & Martin, p. 159.

At present there is no evidence to suggest that the choice between trust and agency has any major bearing on how effectively PBCs can carry out their statutory functions and sustain their operations.

making decisions about matters, whereas an agent PBC may be obliged to follow the instructions of native title holders regardless of its own judgment on the matter.

A second area of potential difference is whether native title holders represented by an agent PBC are likely to be more exposed to personal liability for its debts than those represented by a trustee PBC. Whether these potential differences will be important in practice is not yet clear.

Other considerations

For some native title holders the most significant concern in deciding between a trustee and agent PBC may be their ability to manage an arrangement where their native title rights and interests are not held personally.

Therefore the decision between a trustee or an agent PBC may depend on their familiarity and experience with the concept of a trust, and also their views on individual versus collective responsibility for their native title rights and interests.

Rule 4

Powers of the corporation

The powers of a corporation are usually written in broad terms to enable it to legally carry out its objectives, subject to its rules and the CATSI Act.

A PBC is also subject to the Native Title Act and the PBC Regulations. As noted in the objectives, this means that a PBC cannot make a native title decision unless it has consulted with the relevant group of common law holders of native title and obtained their consent—PBC Regulations 8 and 9.

Sometimes this is not fully understood, so it may be helpful to have the consultation and consent requirements for making a native title decision set out in the rules, or attached as a schedule (see Schedule 2 to this guide).

It may also be helpful to make this clear when defining the powers of the corporation in this rule.

Example rule

4(b) the corporation must consult with, and obtain the consent of, the common law holders before making a native title decision (see Schedule 2).

Rule 5

Membership of the corporation

It is very important to understand that you do not automatically become a member of a PBC even if the Federal Court has recognised you as a native title holder. You need to apply to become a member of your PBC.

Rule 5.1 Members on registration

You can become a member of your PBC when you first apply to the Registrar to register the corporation. The native title holders who are to be the initial members of the PBC must be named and give their consent in the application for registration. They become members of the PBC when it is registered—CATSI Act s. 42-10.

Rule 5.2 Members by application

If your name is not included on the application for registration, you can apply for membership of the PBC after ORIC has registered it—CATSI Act s. 144-5.

An application for membership is made in writing, although your rules can change this—CATSI Act s. 144-5. If your rules change this they must deal with how the application is to be made (for example, verbally to the directors). The corporation will need to keep a written record of the application.

All inclusive or representative membership

One important matter to be decided is whether membership should be open to all native title holders identified in the determination of native title, or whether it should be limited to a smaller number of individuals who are appointed to represent all native title holders.

The final choice is likely to be influenced by the cultural, social, economic and political characteristics of the native title holders, and also by practical, financial and other resource considerations and circumstances. You may need to review the overall costs and benefits of each option and how it impacts on the group's circumstances.

See Mantziaris & Martin,
ch. 10—Practical Illustrations
of the Design Process

A trustee or agent PBC with all native title holders as members

For a small, clearly identified group of native title holders living in close proximity to each other, it may be appropriate to include all native title holders as members so that everyone has the opportunity to attend meetings and actively participate in the running of the PBC.

A trustee or agent PBC with a representative membership

If the number of native title holders is large, or they are dispersed over a wide area, or the population is very mobile, it may be difficult or impossible to include all native title holders as members on registration, or give them an opportunity to become members.

In these circumstances it may be more practical for a PBC to have a limited number of members who are nominated to represent all native title holders, and who can attend meetings and help run the corporation. This is called representative membership.

PBC as trustee or agent for all native title holders

The fundamental statutory role of a PBC is to be the trustee for or agent of the people determined by the Federal Court to be the native title holders.

If the PBC has an all inclusive membership, it should make sure that an appropriate process is in place so that all native title holders can be admitted as members and participate in the corporation.

If the PBC has a representative membership, it should make sure that an appropriate structure and process is in place to enable all native title holders to be properly represented within the corporation. In accordance with regulation 8 of the PBC Regulations, the PBC must consult with and obtain the consent of the common law holders before making a native title decision (see Schedule 2).

**Rule 5.2.2 Who can apply to become a member
(eligibility for membership)**

A person becomes a member of the PBC if:

- they are eligible for membership
- the directors accept the application
- the person's name is entered on the register of members—CATSI Act s. 144-1.

The directors cannot accept an application for membership unless that person is eligible to be a member—CATSI Act s. 144-10.

This is in contrast to the provisions of the CATSI Act that apply generally to Aboriginal or Torres Strait Islander corporations which have no such restriction, and even permit non-Indigenous membership.

The PBC Regulations currently require all members of a PBC to be native title holders—PBC Regulations 4(2)(a) & (c).

The native title holders will be identified in the Federal Court's determination of native title. A clause setting out the eligibility criteria for membership of a PBC should be consistent with the determination.

Section 225 of the Native Title Act provides that a determination of native title includes a determination of who the persons, or each group of persons, holding the common or group rights comprising the native title are. Therefore, a native title determination may identify individual native title holders, although frequently the determination will only identify native title holders in broad terms by referring to their descent from specific ancestors, or as members of a particular tribe, clan or family, or a language or other group.

It may be helpful for the rules of your PBC to refer directly to the words contained in your determination of native title. To do this attach the relevant part of the determination as a schedule to the rules, and specify in the dictionary definitions of 'common law holders' or 'native title holders' the people identified in the Federal Court determination.

Some examples of how the native title eligibility criteria could be set out in the rules of different PBCs include:

A person who is eligible to apply for membership must be an individual who is:

- a native title holder [where 'native title holder' is defined by specific reference to the native title determination]
- a member of the people/tribe/group
- a descendant of [named ancestor]

and/or

- who identifies as a member of the people/tribe/group
- who is recognised by the people/tribe/group as being a member of their people/tribe/group.

You may need to adjust this rule if there is more than one group.

Rule 5.7.1 Process for cancelling membership if member is not or ceases to be eligible

If a person is not eligible for membership (for example, they are not a native title holder) the directors can cancel their membership. There is a process set out in one of the replaceable rules in the CATSI Act for this. However, if the person objects, the replaceable rule says that the membership can only be cancelled by a resolution of a general meeting of members—CATSI Act s. 150-20.

You may want to have a different process for dealing with the cancellation of membership. For example, you may want to refer the matter to a meeting of native title holders or elders before any decision made by the directors or before the matter is referred to members at a general meeting. If necessary, you may also want to use the corporation's dispute resolution process.

Example rule

5.7.1(d)

If the member does object, as set out in rule 5.7.1(b)(iii)

- (a) the directors must not cancel the membership
- (b) the directors may deal with the objection as if it were a dispute notice, and have it dealt with under the dispute resolution process in rule 17
- (c) only the corporation by resolution in general meeting may cancel the membership.

Rules 5.7.2 – 5.7.4 Membership may be cancelled for other reasons

The CATSI Act sets out compulsory rules for cancelling membership by special resolution:

- if a member cannot be contacted for two years
- if they are not an Aboriginal or Torres Strait Islander person
- if the member has behaved in a way that significantly interfered with the operation of the corporation or its meetings—CATSI Act ss. 150-25, 150-30, 150-35.

If you consider that these rules would be inappropriate in your circumstances or would impose unreasonable burdens on the PBC, you can apply to the Registrar to be exempted from them—CATSI Act Division 187.

Rule 6

Register of members and former members

A PBC must set up and maintain a register of members and a register of former members—CATSI Act Division 180. This is important so that it is clear who is entitled to vote at meetings of your corporation.

Rule 6.5.2 Right to inspect registers

The CATSI Regulations have not yet prescribed an amount.

The CATSI Act requires a PBC to make its register of members and register of former members available for inspection by members without charge, and by any person once they pay a fee (up to the prescribed amount)—CATSI Act s. 180-25.

However, it should be noted that it is an offence under the CATSI Act for anyone to use information about a person obtained from a register of members to contact or send material to the person, unless it relevant to their membership or is approved by the PBC—CATSI Act Division 183.

Rule 7

Annual general meetings and general meetings

The CATSI Act has a number of replaceable rules about general meetings—all of the replaceable rules are listed in the CATSI Act s. 57-5. You can keep them or change these replaceable rules, but you must ensure that any change deals with the matter covered by the original rule—CATSI Act Division 60. The CATSI Act also specifies a number of compulsory rules about meetings that cannot be replaced or changed.

However, you can apply for an exemption to the Registrar from these rules if they would be inappropriate in your circumstances or they would impose unreasonable burdens on your PBC—CATSI Act Division 225.

Rule 7.1.1 Holding AGMs

Under the CATSI Act a corporation must hold its annual general meeting (AGM) within five months after the end of its financial year, that is, before 30 November each year—CATSI Act s. 201-150. However, if this would be inappropriate in your circumstances or would impose

unreasonable burdens on your PBC, you can apply for an exemption to hold your AGM less often.

An example might be if your corporation is not active, and does not have the money and resources to organise and hold an AGM every year. If so, you might want to apply to hold your AGM every 2 years.

Rule 7.1.2 Extension of time for holding AGMs

If you want to hold your AGM every year but cannot hold it before 30 November, you can apply to the Registrar before 30 November for an extension of time—CATSI Act s. 201-155.

Rule 7.4 Requirement for notice of general meeting

The CATSI Act has a number of compulsory and replaceable rules about how to call and give notice of a general meeting—CATSI Act Subdivision 201-B. A PBC may want to change or add to some of the replaceable rules.

For example, you may want to add a rule that says that a notice of a general meeting can be published in a newspaper in the local area, or placed on notice boards in your community.

You also may want to notify native title holders who are not members of the PBC about the meeting, so that they can attend and listen to the matters being discussed and learn about what the PBC is doing.

Rule 7.7 Quorum for general meeting

A quorum is the minimum number of members required to hold a meeting.

It is important to agree on a quorum to make sure that an appropriate minimum number of members are present to make decisions, but that the number required is not so high as to make it difficult to get enough people attending to hold a meeting.

The CATSI Act adopts a model for quorums that states how many people make up a quorum depending on how many members the corporation has.

20 or less members	= 2 members
21 to 30 members	= 3 members
31 to 40 members	= 4 members
41 to 50 members	= 5 members
51 to 60 members	= 6 members
61 to 70 members	= 7 members
71 to 80 members	= 8 members
81 to 90 members	= 9 members
91 members or more	= 10 members

However, if the membership of a PBC is made up of different groups of native title holders, your rules can change this. It may be better to have an extra requirement for a quorum specifying a minimum number of members from each group.

Example quorum rule

The quorum for a general meeting ismembers, with at leastmembers being present from each group.

Rule 7.11 Voting at general meetings

The replaceable rules about voting at general meetings provide that each member has one vote, and resolutions must be decided by a simple majority—CATSI Act ss. 201-115 and 201-125. Native title holders can consider using a more appropriate decision-making process in some circumstances.

For example, the rules could provide that decisions at a general meeting must be made according to traditional laws and customs, or they might provide for the meeting to try and make decisions by consensus—that is, with general agreement and no one objecting.

Example decision-making rule

A resolution at a general meeting should be decided by consensus or, if consensus cannot be reached after a reasonable effort has been made, by majority vote.

Rule 8 Directors of the corporation

Rule 8.1 Number of directors

Under the CATSI Act, most corporations will have between 3 and 12 directors—CATSI Act ss. 243-1 and 243-5.

For example, the membership of your PBC is made up of a large number of tribes, clans or families, and it is important to have more than 12 directors to properly represent all native title holders.

If this is inappropriate in your circumstances, the directors can ask the Registrar for an exemption—CATSI Act s. 310-5. This may mean you can have more than 12 directors if this is necessary to properly represent all native title holders.

However, it is important to know that the CATSI Act allows the directors to involve other people in decision-making, by delegating their powers to them—CATSI Act s. 274-10. This can be done by setting up committees or including native title holders who are not members in decision-making. By doing this, it may not be necessary to have more than 12 directors.

Composition of board of directors

If your PBC has members from different groups, you may want to include an extra rule that each group can appoint an agreed number of directors.

Example directors clause

The corporation will havedirectors, with each group appointingdirectors.

It is important that native title holders appoint the right people as directors so that the PBC can be effective and carry out its functions. This means that as well as appointing people who represent all native title holders, you also need to appoint people who are willing and able to attend meetings and do the work that is necessary for your PBC to operate.

You may also want to think about the mix of people you would like as directors. For example, you may want to have a mix of senior people and younger people, men and women, or some other combination that is appropriate for you.

The CATSI Act also allows you to appoint directors who are not members or native title holders, but you need to put a specific rule in your constitution to allow this—CATSI Act ss. 246-5(3) and 246-1(3). This would mean you could appoint independent directors with special expertise.

Example rule—appointment of directors who are not members

The corporation may appoint a person who is not a member of the corporation as a director, by resolution in general meeting, provided that a majority of the directors are native title holders and members of the corporation.

How directors are appointed or elected

There are several ways that you can decide who should be the directors of your corporation. It is best to develop a process that is appropriate for your circumstances.

Many corporations elect the directors at the AGM by a vote of all the members. If you have more than one group of native title holders, you may want each group of members to nominate directors from their group at the AGM.

In some circumstances you may want to have the directors chosen at a meeting or meetings of native title holders (rather than at a meeting of members) held before the AGM. These meetings might be separated into smaller groups. In this way, all native title holders (including those who are not members) can decide who they want to be the directors. The native title holders who are members can confirm this at the AGM.

Rule 9 **General duties of directors**

It is very important for the good governance of a PBC that each director and officer is aware of the general duties in the CATSI Act and the general law—CATSI Act s. 683-1 and Division 265. These include a duty:

- of care and diligence
- of good faith
- not to improperly use position or information.

See discussion in Mantziaris & Martin, pp. 152 & 189

A director also has a fiduciary duty to act ‘in the best interests of the corporation as a whole’, rather than in the interests of particular members (including any group of members that appointed them).

Acts done to comply with native title legislation obligations

The CATSI Act provides that if a director of a PBC does something in good faith believing it is necessary to ensure that the corporation complies with a native title legislation obligation, a director will not be in breach of his or her general duties—CATSI Act ss. 700-1 and 265-20.

An example of this might be if the common law holders of native title ask the directors to do something relating to their native title rights that may not be in the best interests of the corporation. In this situation the obligation to comply with native title legislation takes precedence, and the directors will not be in breach of their general duties that require them to act in the best interests of the corporation.

Example rule

A director is not in breach of his or her general duties if he or she does (or refrains from doing) a particular act in good faith and with the belief that doing (or refraining from doing) the act is necessary to ensure that the corporation complies with a native title legislation obligation.

Duty to prevent insolvent trading by the corporation

The CATSI Act imposes a duty on each director to prevent insolvent trading by the corporation—CATSI Act Division 531. This means that the directors have an obligation to make sure that the PBC can pay its debts as and when they become due and payable, and if it cannot, then they have a duty to prevent the corporation incurring any more debt.

This is the one instance where the CATSI Act prevails over native title legislation obligations—CATSI Act s. 531-5.

Example rule

In the event of a conflict between:

- (a) the duty of a director to ensure that the corporation complies with its native title legislation obligations and
- (b) the duty of a director to prevent insolvent trading by the corporation,

it is the duty of a director to prevent insolvent trading that prevails and the director is released from the duty to ensure that the corporation complies with its native title legislation obligations, to the extent of the conflict.

Liability for debts incurred by corporation as trustee

In certain circumstances the directors of a corporation may be liable for the debts and other obligations of a corporation acting as trustee if the corporation cannot discharge its debts or obligations—CATSI Act s. 271-1.

However, the CATSI Act provides that this liability of a director does not apply to debts or obligations the PBC incurs when a director is acting in good faith believing the PBC is doing what is necessary to comply with a native title legislation obligation—CATSI Act s. 271-1(3)

Example note

A director is not liable for debts and other obligations incurred by the corporation as trustee merely because of doing (or refraining from doing) a particular act if the director acts:

- (a) in good faith, and
- (b) with the belief that doing (or refraining from doing) the act is necessary to ensure that the corporation complies with a native title legislation obligation.

Rule 10

Functions, powers and duties of directors

The powers of the directors are usually very broad, so that they can manage the business of the corporation effectively.

The CATSI Act allows the directors to delegate any of their powers to a committee of directors, a director, an employee or to any other person—CATSI Act s. 274-10. This enables the directors to ensure that people with appropriate experience and expertise (including elders or other native title holders who are not members of the corporation) are able to be involved in providing advice and making decisions.

However, it must be remembered that a trustee or agent PBC has an overriding obligation under the Native Title Act and the PBC Regulations to comply with the directions of native title holders on various matters related to native title, and to consult with native title holders and obtain their consent before making a native title decision—PBC Regulations 6, 7, and 8.

These native title obligations are often not well understood, and therefore we have recommended that you set them out in the rules under the ‘Objectives’ and ‘Statutory functions’ of the PBC.

We have also recommended that you refer to the statutory consultation and consent requirements for making a native title decision—PBC Regulations 8 and 9—under the ‘Powers’ of your PBC, and that you set them out in full in your rules or in a schedule to your rules (see Schedule 2 to this guide).

Rule 10.2 Duty to disclose conflict of interest

A director who has a material personal interest in a matter relating to the affairs of the PBC must give notice to the other directors at a directors’ meeting, and the details must be recorded in the minutes of the meeting—CATSI Act s. 268-1.

If a director has a conflict of interest, the director must not be present or vote while the matter is being considered at a directors’ meeting, unless the other directors give their approval—CATSI Act s. 268-20.

Native title interest is not treated as a conflict of interest

The CATSI Act recognises that the directors of a PBC will often have a native title interest in native title matters that are being discussed at directors’ meetings, as the PBC has been set up to manage their native title rights and interests.

If having a native title interest were to be treated as a conflict of interest it could make things unworkable for most PBCs, as almost every decision could involve a conflict of interest for some of the directors.

Therefore the CATSI Act specially provides that if a director who is a common law holder has a native title interest in a matter, it is not to be treated as a conflict of interest, and the interest is not required to be disclosed to the other directors or noted in the minutes—CATSI Act s. 268-5. Of course, the other native title holder directors will usually be aware that a director has a native title interest in a matter without any need for formal notification.

Example note

The CATSI Act provides that a director, who has a particular interest in a matter as one of the common law holders of native title, being native title:

- (a) which the corporation holds in trust for the common law holders of the native title, or
- (b) for which the corporation acts as agent or representative for the common law holders of the native title,

does not need to give the other directors notice of the interest, and a failure to give the other directors notice of the interest does not breach any general law rule about conflicts of interest—CATSI Act s. 268-5.

Rule 11

Directors' meetings

The CATSI Act sets out a number of compulsory and replaceable rules about directors' meetings. If you think that any of these rules would be inappropriate in your circumstances or would impose unreasonable burdens on your PBC, you can apply for an exemption from them—CATSI Act Division 225.

Rule 11.1 Frequency of directors' meetings

The rules of your PBC must specify how often directors' meetings are to be held—CATSI Act s. 212-1. Ideally directors' meetings should be held at least once every 3 or 4 months, but if your PBC is not likely to be active you may want to specify that directors meet less often than this. You may want to apply for an exemption from this requirement because of the expected costs or the practical difficulties that would be involved in holding the meetings.

Rule 11.3 Quorum at directors' meetings

The CATSI Act says that a quorum for a director's meeting is a majority of the directors and the quorum must be present at all times during the meeting—CATSI Act s. 212-20. If this would be inappropriate in the circumstances or would impose unreasonable burdens on your PBC, you may be able to apply for an exemption from the Registrar—CATSI Act Division 225.

If your PBC represents different groups of native title holders and the groups nominate their directors, you can have an extra condition for a quorum, requiring a minimum number of directors from each group to be present.

Example quorum rule

The quorum for a directors' meeting is a majority of directors with at least 2 directors present from each group of native title holders. The quorum must be present at all times during the meeting.

Rule 11.6.1 Passing resolutions at directors' meetings

The CATSI Act has a replaceable rule requiring a resolution of directors to be passed by a majority of the votes cast by directors, with the chair having a casting vote if necessary—CATSI Act s. 212-25.

Your directors may want to use a different or more appropriate decision-making process. For example, they may want decisions to be reached according to traditional laws and customs, or they might want decisions to be made by consensus.

Example directors' decision-making rule

Decisions at a directors' meeting are to be made by consensus or, if consensus cannot be reached after a reasonable effort has been made, by a majority vote. The chair has a casting vote if necessary, in addition to any vote he or she has as a director.

Rule 14

Finances and recordkeeping

Rule 14.11 Access to governance material

Directors and members should be aware that the CATSI Act, in the interests of promoting good governance, requires that if a member asks for a copy of the rules of their PBC, the corporation must provide it free of charge within 7 days—CATSI Act s. 72-5.

A copy of the rules of a PBC is also available on ORIC's website at www.oric.gov.au where you can find a copy of the rules of all Aboriginal and Torres Strait Islander corporations.

Rule 17

Dispute resolution process

The CATSI Act requires a corporation's rules to cover the resolution of disputes within the corporation—CATSI Act s. 66-1(3A)—and ORIC's Rule Book Info Kit sets out a possible dispute resolution process.

It is important for the good governance of a PBC to have an appropriate process to resolve disputes when they arise. Disputes about a corporation can arise between members and directors. For a PBC, they can also arise between native title holders, and between native title holders and the corporation and its members and directors.

It is usually best for the parties themselves to try and resolve a dispute informally. If the dispute involves interpreting one of the PBC's rules, you can seek assistance from ORIC.

If the dispute cannot be resolved informally, the directors can make other reasonable efforts to resolve the dispute. If this is unsuccessful other options include:

- referring the dispute to a meeting of native title holders, or to a council, tribunal or advisory group of elders
- referring the dispute to a mediator or arbitrator agreed to by the parties, or to a respected independent party
- requesting the assistance of the NTRB
- referring the dispute to a general meeting of the PBC.

Example rule

17.5 Referring the dispute to alternative processes and/or a general meeting

- (a) If the directors cannot resolve the dispute within days after the corporation receives the dispute notice, they may refer the dispute to:
 - (i) a meeting of native title holders (or group of native title holders)
 - (ii) a meeting or council of elders
 - (iii) an independent mediator agreed to by the parties in dispute or
 - (iv) the native title representative body for the region.
- (b) If the directors, a meeting of native title holders, a meeting or council of elders, a mediator or the NTRB are unable to resolve the dispute within days after the corporation receives the dispute notice, the directors must hold a general meeting of the corporation within 3 months of receiving the dispute notice.
- (c) When passing any resolution about a dispute, the members in the general meeting are subject to the Act and these rules.

Rule 20

Amendment of the constitution

Under the CATSI Act, if a corporation wants to change its rules, it must pass a special resolution—that is, a resolution passed by at least 75% of the members voting at a general meeting. The CATSI Act also allows corporations to include extra steps or requirements in their rules before the rules can be changed—CATSI Act s. 69-5.

You may want to make any rule changes about important matters subject to additional consideration and approval before being put to a vote at a general meeting. For example, you may first want a consultation and consent process similar to that required for a native title decision, or you may want any important rule changes to first be approved by a meeting of native title holders or elders.

This might be done for changes to the objectives or functions of the PBC, or any proposal to change the definition of ‘native title holder’ or ‘common law holder’, or changes to the criteria for eligibility for membership.

Example rule

20.1 For the corporation to change its constitution, the following steps must be complied with:

- (a) the corporation must pass a special resolution effecting the change
- (b) the corporation must not change or amend rules except as required by law or after first obtaining the approval and consent of the native title holders.
- (c)
- (d)

Schedule 1

Determination of native title

[Insert the relevant extract(s) from your determination of native title identifying the determination area, the persons who hold the common or group rights comprising the native title, and identifying the nature and extent of the native title rights and interests]

Schedule 2

Native title decision—consultation and consent

Before making a native title decision the corporation must consult with and obtain the consent of the common law holders in the following manner:

1. The corporation must ensure that the common law holders understand the purpose and nature of a proposed native title decision and have:
 - (a) given their consent in accordance with a particular process of decision-making that must be followed under their traditional laws and customs or
 - (b) if there is no particular process of decision-making that must be followed under their traditional laws and customs, have given their consent in accordance with the process of decision-making agreed to, or adopted by them, for the proposed native title decision, or for decisions of the same kind.
2. The corporation must consult and consider the views of the NTRB for the area, and if the corporation considers it to be appropriate and practical, give notice of those views to the common law holders.
3. If the corporation acts as trustee for, or agent or representative of, more than one group of common law holders, it must consult with, and obtain the consent of only those groups of common law holders whose native title rights and interests would be affected by the proposed native title decision.
4. The common law holders are taken to have been consulted and to have consented to a proposed native title decision if a document (prepared and signed in accordance with regulation 9 of the PBC Regulations) certifies that they have been consulted and have consented in the required manner.

You may want to set out the content of regulation 9 in full, although it is detailed and over a page in length. In essence it provides that common law holders are taken to have been consulted and to have consented to a proposed native title decision if:

- (a) a document certifying this is signed by at least 5 members of the PBC who are common law holders whose native title rights and interests would be affected by the decision and**
- (b) a document certifying that the NTRB has been consulted is signed by at least 5 members of the PBC, and a document is signed by the NTRB certifying that it has been consulted.**



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FACT SHEET

APPENDIX 2

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Legal context for PBC* decision making

Legislation

There are two pieces of legislation which talk about PBC decision making about native title:

- the Native Title Act 1993 (Cth)
- the Native Title (Prescribed Body Corporate) Regulations 1999 (Cth), (**PBC Regs**) which were made under the *Native Title Act*.

These apply whether a PBC is:

- a trustee PBC – holding native title on behalf of the native title holders, OR
- an agent PBC – managing the native title on behalf of the native title holders, who hold the native title.

PBC legal responsibilities

The Native Title Act and the PBC Regs say that the PBC needs to:

- **consult** with the native title holders about surrendering or doing things (acts) that will affect their native title; AND
- make sure the native title holders **understand** the purpose and nature of the proposed decision (*PBC Regs 8(2)*); AND
- obtain their **consent** before they go ahead with the acts (*PBC Regs 8(1)*).

Plus the PBC Regs say that the PBC must:

- consult with the relevant Native Title Representative Bodies/ Native Title Service Provider (**NTRB**), consider its views and, if appropriate and practical, tell the native title holders about these (*PBC Regs 8(2)*).

What is a decision that affects native title?

A '**native title decision**' is a decision to give up native title rights and interests, or to do (or agree to do) something that would affect the native title rights or interests of the native title holders.

For example:

- decisions about future acts (responding to future act notices)
- making right to negotiate agreements
- signing Indigenous land use agreements (ILUAs).



Australian Government

Department of Families, Housing,
Community Services and Indigenous Affairs

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* PBCs are Prescribed Bodies Corporate. Once registered with the NNTT, they are also called Registered Native Title Bodies Corporate (RNTBCs).




FACT SHEET

What sorts of decisions can a PBC make?

PBCs have to make three kinds of decisions. This fact sheet focuses more on native title decisions (which are covered in points 2 and 3 on this page):

1. Those made by the PBC directors with their own thinking about the internal governance of the PBC. These decisions come under Australian law, for example the *Corporations (Aboriginal and Torres Strait Islander) Act 2006 (CATSI Act)* and the common law. Breaching some of the requirements of that law can be a criminal offence. These kind of decisions cover for example:
 - how the PBC is to be run
 - the powers of the CEO and the board in running the PBC
 - rules for PBC members' meetings (eg annual general meetings) and special general meetings)
 - financial management.
2. Decisions that directors can make where they have to follow any rules made by the native title holders, for example:
 - a. alternative consultation processes (see page 3)
 - b. standing consents (see page 4).
3. Decisions that have a large effect on native title must be made by the native title holders. They include making ILUAs and agreements under the right to negotiate. The PBC directors then pass on these decisions to government. These decisions are NOT the directors' own thinking.



This Fact Sheet contains general information only and is not a substitute for getting legal advice. Aurora does not accept liability for any action taken based on this Fact Sheet or for any loss suffered because someone relied on it. We urge native title holders and PBCs to get legal advice on any matter which may impact on their native title rights and interests.

Deciding how native title decisions will be made

The way that PBCs make decisions is controlled by the *CATSI Act*, the *PBC Regs*, and their Rulebook.

PBC Regs 8(3) & (4) and section 251 of the *Native Title Act* talk about the PBC having to use particular decision making processes for making ILUAs and other native title decisions:

1. a decision making process that must be followed under traditional laws and customs, for example:
 - elders make the decision; or
 - native title holders particularly affected make the decision.

OR:

2. if there is no traditional process, a process agreed to by native title holders, for example:
 - everyone has one vote at a meeting;
 - one person makes the decision
 - PBC directors make the decision; OR
 - some other process

There are two other kinds of decision making processes where the directors of the PBC can make the decision but they have to follow the rules made by the native title holders:

- a. alternative consultation processes
- b. standing consents.

These are explained below.

a. Alternative consultation processes (*PBC Regs* 8(1)(d) & 8A)

The native title holders can agree to one or more alternative consultation processes for making decisions about their native title which:

- they have been consulted about and have consented to; AND
- are set out in the PBC's Rulebook.

An alternative consultation process:

- can be about whatever the native title holders decide, except when:
 - making ILUAs, OR
 - making agreements under the right to negotiate, OR
 - allowing non-native title holders to be members, OR

- setting up an alternative consultation process (*PBC Regs* 8(1)); AND

- must be followed before the PBC can make a decision that is covered by it.

Any 'alternative consultation process' must be in the PBC's Rulebook which must set out:

- the types of decisions which can be made by the alternative process; and
- the details of the process.



FACT SHEET

b. Standing consents (*PBC Regs* 9(1)(a)(ii))

Under a standing consent given by the native title holders to the PBC Directors, the PBC makes decisions about certain kinds of native title matters and doesn't have to consult the native title holders every time.

This can save both the native title holders and the PBC Directors lots of time and effort.

For example decisions about:

- the right to comment on low level Future Acts (e.g. granting grazing licences near pastoral leases or water licences)
- the right to comment on a National Park Management Plan.

The native title determination and the PBC's decision making process

Your native title determination sets out who the native title holders are in general terms. It doesn't talk about who has specific rights to particular areas and has no effect on decision making. It just identifies the group, the native title (and other) rights and interests, and the area.

This means it is up to the PBC to make the decision making process

work on the ground. It will need to take into account a range of particular native title rights and interests within the group.

Native title holders often know, under traditional law and custom:

- which people can exercise what native title rights where (i.e. who can speak for what parts of the native title area)
- which people can make decisions about which future acts.

If the PBC is uncertain about which people to consult, or there is a dispute about this, it may seek assistance from the NTRB to undertake further anthropological work or some form of mediation or community facilitation, or it may consult and obtain consent from the whole native title group.



How to consult native title holders

Although the *Native Title Act* and the *PBC Regs* say that PBCs need to consult with their native title holders and obtain their consent, they do not actually say how to do this. That is up to PBCs themselves.

Documents to prove consultation

To show that the consultation processes have been properly followed, the PBC needs to produce three certificates:

1. a certificate of the native title holders that they have been consulted and have consented (*PBC Regs 9(1)*)
2. a PBC certificate about NTRB consultation (*PBC Regs 9(6)(a)*)
3. an NTRB certificate about NTRB consultation (*PBC Regs 9(6)(b)*).

The native title holders' certificate (*PBC Regs 9(1)*):

- must state that the native title holders have been consulted about and have consented to the proposed decision under:
 - i. the process set out in the *PBC Regs*; OR
 - ii. the alternative consultation process set out in the PBC's Constitution/Rulebook; OR
 - iii. a standing consent, and there is a statement about the process of consultation and consent for the standing consent.
- must be signed by at least five PBC members whose native title rights and interests are affected by the decision (*PBC Regs 9(4)*).

The PBC Certificate about NTRB consultation (*PBC Regs 9(6)(a)*):

- must state that the NTRB has been consulted and its views have been considered; AND
- must be signed by at least five PBC members whose native title rights and interests are affected by the decision.

The NTRB Certificate about NTRB consultation (*PBC Regs 9(6)(b)*):

- must state that the NTRB has been consulted about the decision; AND
- must be signed by at least one authorised NTRB member.

In practice, these certificates might be in one document, which should be kept in the PBC's records.

Charging for services

The PBC Regs also say when and how a PBC can charge a 'fee for service'. PBCs can charge those who are proposing future acts that may impact on the native title. The fee includes the cost of consulting with the native title holders to get their consent, where the PBC is required by law to do this (e.g. the cost of consulting and obtaining native title holders' consent about a proposed future act).