



Australian Government
National Indigenous
Australians Agency



NIAA

Information for PBCs on changes to native title laws and obligations

Overview

Working with Aboriginal and Torres Strait Islander peoples



Background

On 3 February 2021, the Australian Government passed the ***Native Title Legislation Amendment Act 2021 (Amendment Act)***.

- The Amendment Act makes changes to the *Native Title Act 1993* (NTA) and *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (CATSI Act).

The Government also made changes that affect Prescribed Bodies Corporate (PBCs) in the ***Registered Native Title Bodies Corporate Legislation Amendment Regulations 2021 (Amendment Regulations)***.

- The Amendment Regulations mainly change the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (PBC Regulations). They also make some consequential changes to the *Corporations (Aboriginal and Torres Strait Islander) Regulations 2017* and *Native Title (Indigenous Land Use Agreements) Regulations 1999*.

These changes introduce new rules and requirements for PBCs, including the requirement for existing PBCs to amend their rule books. The starting date for these changes is 25 March 2021. Existing PBCs have two years to make the rule book changes.

The amendments fall into **three broad categories**:

1. Measures that streamline **PBC decision-making**
2. Measures that increase the **transparency and accountability** of PBCs to common law holders
3. Measures that assist with the **management and resolution of post-determination disputes**
 - a) Improvements to PBC membership decisions and rules
 - b) Improvements to dispute resolution pathways

This factsheet provides an overview of the changes.

More information about the amendments can be found on the [Changes to Native Title legislation affecting Prescribed Bodies Corporate \(PBCs\) page](#) on the NIAA website.

Rule book: The rule book explains how the corporation operates, who can become a member, and how members and directors have to make decisions and run the corporation. All CATSI Act corporations need to have rule books. Rule books are also referred to as a corporation's constitution

What is new for PBCs?

1. Streamlining PBC decision-making

Native title decisions – The PBC regulations more clearly define 'native title decisions' and describe the processes that must be followed by PBCs for making them. This means the regulations that relate to consultation and consent requirements for native title decisions are easier to understand and give clear guidance in respect of their implementation.

Compensation applications – PBCs can now make more types of applications for compensation. Before making a compensation application, PBCs must consult the relevant common law holders and obtain their consent to making the application. This means common law holders have a say before a compensation application is made by their PBC and decision-making around compensation applications is more transparent.



Consulting Native Title Representative Bodies/Service Providers (NTRB/SPs) – PBCs are no longer required to consult with their NTRB/SPs when making a native title decision. This means a streamlining of PBC native title decision-making.

Standing instructions – Common law holders can now give their PBC standing instructions about decisions to enter into an Indigenous Land Use Agreement (ILUA) or section 31 agreement under the NTA when the PBC itself is the beneficiary or only grantee party (i.e. the body who has applied to the government for the grant of a mining tenement such as exploration licences and mining leases). This means that decision-making in relation to these types of agreements is streamlined, if common law holders agree to provide standing instructions. This will avoid time-consuming and costly consultation processes each time a PBC wants to enter into these types of agreements.

2. Increasing the transparency and accountability of PBCs to common law holders

Certificates – PBCs must issue a certificate for every native title decision and decision to make a compensation application.

The certificate has to be signed by the PBC in accordance with the CATSI Act or by the CEO (if any). The common law holders (also referred to as native title holders), persons with a substantial interest in the decision and the Registrar of Indigenous Corporations (Registrar) can request a copy of the certificate.

The Registrar has a new power to assess whether a certificate has been validly issued and can make a non-binding finding. This means there is more transparency around PBC decision-making for common law holders and increased PBC accountability. Being able to access the certificate, the Registrar can assist common law holders with information, found in the certificate, about a particular PBC native title or compensation application decision. This in turn may avoid the escalation of a complaint or dispute.

3. Post-determination dispute management and resolution

a) Improvements to PBC membership decisions and rules

Membership – PBCs must now have eligibility requirements that provide for all common law holders to be represented within the PBC, either directly (for example, through personal membership of the PBC) or indirectly (for example, a single family member may become a member of the PBC to represent an entire family group of common law holders).

The directors of PBCs must accept a membership application when the applicant meets the eligibility criteria in the rule book and the applicant applies in writing.

A PBC's rule book must not provide for grounds or processes to cancel membership other than as provided for in the CATSI Act. PBCs cannot add their own grounds for cancelling memberships.

This means that all common law holders are represented by the PBC and their representation cannot be excluded. The changes seek to prevent a PBC from arbitrarily excluding some common law holders from membership.

b) Improvements to dispute resolution pathways

New dispute resolution clause – A PBC's rule book must now include a clause about disputes between the PBC and a person who is, or who claims to be, a common law holder (whether or not the person is a member of the PBC).



The clause must cover disputes about whether or not a person is a common law holder or the PBC's performance of its native title functions. This means common law holders and PBCs have a further mechanism that helps them with the management of post-determination disputes which they can tailor to their traditional laws and customs and circumstances. This supports self-determination.

Special administration – The grounds for the Registrar of Indigenous Corporations to consider placing a PBC under special administration have been extended to include when the PBC breaches its native title obligations seriously or repeatedly.

National Native Title Tribunal (NNTT) – The NNTT now has the function to assist PBCs and common law holders, including with mediation of disputes. This means further support is available to PBCs and common law holders.

Federal Court - All PBC-related court matters under the CATSI Act must now commence in the Federal Court. This means the Federal Court will be able to apply its native title expertise, case management tools and strategies for resolving disputes in relation to native title applications, which it has developed over more than two decades nationally, to court matters involving PBCs.

What do PBCs need to do?

PBCs registered before 25 March 2021 have two years to make the **following changes to their rule books**:

- **add a dispute resolution clause** for disputes between the PBC and common law holders and persons who claim to be common law holders about whether or not the person is a common law holder or the PBC's performance of its native title functions.
- **remove any rules that provide for grounds for membership to be cancelled that are additional to those set out in the CATSI Act** so that only the grounds in the CATSI Act apply. The reasons in the CATSI Act are: ineligibility for membership or failure to pay fees; being uncontactable; not being an Aboriginal and Torres Strait Islander person; and having misbehaved i.e. the member has behaved in a manner that significantly interfered with the operation of the PBC or of PBC meetings.
- **remove any rules that set out a process for cancelling membership on the grounds of ineligibility or failure to pay fees that are different to the processes set out in the CATSI Act.**
- **make sure the membership criteria provides for all common law holders to be represented within the PBC and make all necessary consequential changes to the rule book.** Representation can be direct (for example, through personal membership) or indirect (for example, a single family member becomes a member to represent their entire family group).

New PBCs (i.e. PBCs that come into existence on or after 25 March 2021) must ensure that their rule books comply with the CATSI Act (and include these reforms) when they incorporate under the CATSI Act.

To **change a rule book**, the members need to **pass a special resolution**. This means at least 75 per cent of the votes cast by members entitled to vote on the resolution (at a general meeting whose notice sets out the intention to propose the resolution) have agreed to it.

Assistance available to PBCs

ORIC provides information and guidance for corporations to revise their rule books—see oric.gov.au.



ORIC can help with the drafting of your rules by reviewing drafts rules and providing feedback—request assistance through info@oric.gov.au.

ORIC has a rules re-design workshop that covers rule requirements under the CATSI Act and also provides examples of governance structures. ORIC facilitates discussion and decision-making by your corporation about rules for your corporation. After the workshop ORIC can help refine the draft rule book. Request a workshop through training@oric.gov.au.

Reviewing your rule book more broadly

The required rule book changes present a good opportunity to review your rule book more broadly.

- Does your rule book meet your needs, does it operate well for your board of directors, members and common law holders?
- Are there rules that could be tailored to your particular circumstances, to better reflect your laws and customs and the way you would like to operate? For example, does your internal dispute resolution clause reflect the way you resolve, or would like to resolve, disputes?

Current CATSI Act Review

There may be further changes to rule books required as a result of the comprehensive review of the CATSI Act. The National Indigenous Australians Agency (NIAA) is coordinating the review. For more information see [the NIAA page on the review](#).