



Working with Aboriginal and Torres Strait Islander peoples

Registered Native Title bodies corporate

Registered Native Title Bodies Corporate (RNTBCs) are different from other CATSI corporations. Their purpose is to manage native title on behalf of the native title holders - who are also called the common law holders. A RNTBC is sometimes called a Prescribed Body Corporate (PBC). We will be using the term RNTBC in this document.

The *Native Title Act 1993* (NTA) and the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (PBC Regulations) say an RNTBCs must be registered under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (CATSI Act).

Like other CATSI Act corporations they must also look after their members and have general meetings and provide general and financial reports.

Unlike other CATSI Act corporations, RNTBCs must also look after the rights and interests of common law holders, whether or not they are a member of the RNTBC or live in a different place from where the RNTBC is based.

As well as the CATSI Act, RNTBCs must follow other laws, especially native title law. For example, the PBC Regulations say the RNTBC must talk to and get consent from the common law holders about decisions that affect native title rights or interests. Making sure these different laws are followed can be confusing for RNTBC directors, their members and common law holders.

Sometimes a lack of understanding of the common law holders about these different laws, what the RNTBC must do, and how native title decisions must be made leads to disputes in the RNTBC, which can make it hard for the RNTBC to do its job.

The Australian Parliament is deciding on whether to make new law to help RNTBCs with these disputes and to fix some problems that might lead to disputes.¹ The possible changes in this new law to the CATSI Act, the NTA and PBC Regulations have already been consulted on. The changes proposed in this factsheet would be additional.

¹ The new native title law would:

- require RNTBC constitutions to have dispute resolution pathways for people who are or who claim to be common law holders, and provide for all the common law holders to be directly or indirectly represented in the RNTBC;
- limit the grounds for cancelling the membership of a member of a RNTBC;
- remove the choice of directors of RNTBCs to refuse certain membership applications; and,
- make clear the Registrar of Indigenous Corporations may place a RNTBC under special administration in certain circumstances.



Transparency about native title monies

What are native title benefits?

Common law holders make agreements with Governments and others like miners about using the land they have native title rights over for example Indigenous Land Use Agreements (ILUAs).

These agreements can provide money for common law holders (in this factsheet we call this native title money), like royalties from mining. But they can also include other benefits for common law holders (we call these non-monetary benefits), such as buildings, land and job commitments. Together they are native title benefits.

We have been told by those who responded to our online survey at the beginning of the review that common law holders need more and better information about the benefits they get from native title agreements. Such as:

- how decisions were made about the use of native title monies
- proper accounting for native title monies coming in and going out by the body that holds the native title monies—which will depend on the **Benefit Management Structure**
- reports about the use of native title monies from the RNTBC—whether the RNTBC holds money or not.

What is a Benefit Management Structure (BMS) ?

BMS refers to a number of different corporations or trusts that manage native title benefits for common law holders.

A BMS is a common way for RNTBCs to manage risk and tax and can work well. However, some common law holders tell us that they do not get enough information from the BMS about their native title monies, including how their native title money is used.

Although RNTBCs are a small number of CATSI corporations, they represent about a quarter of all complaints to ORIC. Many of these complaints are about who looks after native title monies and other benefits and how native title monies and non-monetary benefits are used.

We want to make sure that the law and regulations about native title benefits is clear and is a good fit. We want RNTBC directors, members and common law holders to understand that native title monies are separate and different from other money that a corporation may get, for example grants from Government.

We also want to ensure transparency and accountability around native title monies so that:

- there is a record of native title monies coming in and going out
- decisions made about native title benefits are documented in meeting notes and accounts
- general reports and financial reports on native title benefits are provided to help common law holders to understand the native title money story.



We believe that making this information available will allow common law holders to monitor the performance of their native title benefits and will prevent disputes between common law holders and their RNTBC.

An additional complication is that different regulators may regulate the different corporations and trusts in a BMS.

- The Registrar of Indigenous Corporations is the CATSI Act regulator.
- The regulator for corporations registered under the *Corporations Act 2001* is the Australian Securities and Investments Commission.
- The regulator for charitable trusts and other not-for-profit organisations is the Australian Charities and Not for Profit Commission.
- Some trusts have no regulator.

Sometimes, when different regulators are involved the native title money story can be difficult to follow. Also, some trusts were set up before a native title determination and may no longer work well for the native title group. Some of these trusts can cost a lot of money to run.

To make BMS less complicated, it is an option to change the law to allow trusts to be created under the CATSI Act, separate from RNTBCs, so that the Registrar of Indigenous Corporations can be the regulator.

The Registrar could then ensure the trust is transparent and accountable to common law holders around the native title monies it holds.

A special Benefit Management Structure

There has been a lot of discussion over many years about creating a specific BMS for common law holder groups that can support economic development using native title rights and native title benefits.

Charitable trusts have limits on how they can fund economic opportunities. Changes in 2013 to the tax laws and the *Charities Act 2013* have helped. Monies can be saved for use over time and used for economic outcomes that also have a charitable purpose.

What we want to know from you

- Is there still a need for a native title specific BMS to help common law holders engage in economic development opportunities using their native title benefits?



Recording, reporting and decision making

The CATSI Act does not require a RNTBC or a related trust or other corporation to report to the RNTBC members or common law holders about their native title monies or benefits.

The exception to this is when common law holders approve the RNTBC using native title monies for corporate use. Once this happens the money changes from being native title monies to corporate money, and the RNTBC must report on its use. Examples of a corporate use are to pay a RNTBC staff member or to lease an office space.

The PBC Regulations say that the RNTBC must invest or otherwise use native title monies as the common law holders say. But the regulations do not say how, when or how often RNTBCs must get this direction from common law holders.

Also, the PBC Regulations only apply to native title monies held by the RNTBC on trust for the common law holders. When native title monies are held by a separate corporation or trust there may be no requirement for that body to get a direction from common law holders on the investment and use of the native title monies or to report on it. Whether there is a requirement or not will depend on the rules of the corporation or trust.

We are proposing to change the law to require RNTBCs to keep native title monies and non-monetary benefits separate from other monies and to regularly report about monies and benefits to members and common law holders as part of their reporting under the CATSI Act. We think RNTBCs with bigger sums of native title monies should provide more detailed information in their annual financial report.

To avoid confusion, the law would also need a definition of native title money to separate it from other monies that the corporation may receive (e.g. government grants, contract administration fees, business activities).

A definition of non-monetary native title benefit would also be needed. This would help everyone understand the money and benefits that belong to the common law holders, what must be reported about and when money or benefits stop being native title money or benefits.

We think the law should be clear that common law holders have decision-making powers about native title money and non-monetary benefits. A change to the PBC Regulations could be made that when a RNTBC wants to make a decisions about native title benefits it must consult with, and have the consent of the common law holders—just like with decisions about native title.

What we want to know from you

- Do you think these changes to reporting about native title benefits will result in better information for common law holders? Is there anything else we should do to get better reporting about the money story?

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- Some RNTBCs are small and don't have much money to report. Any extra reporting can be hard for these RNTBCs. Do you think we should limit these changes to bigger RNTBCs with more money and resources?
 - Should the reporting requirements also apply to other corporations or trusts that hold native title monies, so they also have to report to common law holders?
 - Do you think we should also limit these changes to corporations or trusts that hold a certain amount of native title monies and native title benefits?

It may help if there is a regulator that can be called upon to help where decisions about native title benefits are not made the proper way or where reports are not given about native title benefits. The law could be changed to make the Registrar of Indigenous Corporations the regulator for this, like they are the regulator for the CATSI Act.

- Should the Registrar also have a role as regulator for RNTBCs about native title decisions and reporting about native title money and benefits? This means that a RNTBC member or common law holder could ask the Registrar for help.
- If so, is there any area of the native title business of a RNTBC that ORIC should not have a say about?

Dispute resolution

There are proposed changes to the CATSI Act and the NTA to help RNTBCs with disputes currently before the Australian Parliament. If those laws are passed by Parliament:

- Every RNTBC will be required to have a rule in its rule book that outline how the RNTBC will deal with disputes with persons who are not members of the RNTBC (but believe they are common law holders) just as RNTBCs are already required to have a rule about disputes with members.
- A RNTBC or common law holder will be able to ask the National Native Title Tribunal (NNTT) for mediation to help resolve a dispute.

We won't be able to tell whether these changes will help end disputes until they become law and we see how they work on the ground.

Mediation may not resolve all RNTBC disputes, which for some may leave going to court as the only option. Going to court can be expensive and time-consuming.

Another option to solve disputes is arbitration. Arbitration can happen where people in a dispute (the disputants) tell their story to a qualified person who listens carefully to both sides, asks questions, looks at the evidence and then makes a decision that binds the parties.

Arbitration may be a helpful option where a RNTBC and common law holders, despite having tried, cannot resolve their dispute.



A regulator may be needed to ensure the RNTBC complies with an arbitrated outcome. This could be the Registrar of Indigenous Corporations given they are the regulator for the CATSI Act and have experience in working with Indigenous corporations.

What we want to know from you

- If arbitration is possible, which organisation should hold the function?
- For example would the NNTT be suitable given its mediation role in, and experience with, native title?
- Would the Registrar of Indigenous Corporations be suitable for the role of regulator, enforcing the outcomes of arbitration?

Model RNTBC rule book

RNTBCs have different responsibilities under law. They must treat corporate issues separately from most native title issues and this can be confusing. A good rule book can help directors, members and common law holders with this.

We are proposing a model rule book specifically made for RNTBCs.

ORIC provides resources to help with the development of rule books and already has a general model rule book. A model rule book is an example of what a good rule book is like. It covers things that the CATSI Act requires to be covered by the rules.

A RNTBC model rule book would give examples of good processes to manage disputes and also allow for a RNTBC to develop its own decision-making processes within the CATSI and native title laws.

RNTBC members could choose if they wanted to adopt the model rule book for their RNTBC or use it to help them develop or change their own rules.

What we want to know from you

- Is the development of a RNTBC-specific model rule book a good idea?

Name change recorded on the Register of RNTBCs

If an RNTBC registers a name change under the CATSI Act, it's not clear if the name change can be carried over to the National Native Title Register, which is where the National Native Title Tribunal records the details of native title determinations, including the name of the RNTBC. The Native Title Act could be amended to allow this to happen.



Further ideas

We are seeking your views on all of the proposals which we have outlined in this paper. We also want to hear your views on some other ideas.

Some people in response to our survey suggested that the Registrar of Indigenous Corporations, being the regulator for the CATSI Act, should also have a role in regulating RNTBCs in relation to decisions made about native title. What is your view on this?

Where problems arise in a RNTBC that needs outside help, ORIC could assist in relation to both corporate and native title decision-making.

By working with directors and common law holders, processes can often be put in place that help the RNTBC to meet its native title obligations. This can prevent the appointment of a special administrator and keep the directors and members in control of the organisation.

Given how different RNTBCs across Australia are (size, assets, location, stand-alone or part of a corporate structure) how can we make sure any additional requirements proposed in the RNTBC chapter do not cost RNTBCs more to implement?

The CATSI Act already allows for different requirements depending on whether the RNTBC is classified as small, medium or large. We could build on this to manage the impact on small RNTBCs. Are there other ways we can manage the impact of any changes?

Is there anything else that we should consider to improve transparency and accountability for common law holders?

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