



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.



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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

This guide is not legal advice and is provided for guidance only. ORIC disclaims any liability arising from the use of this guide. People may seek further help from ORIC about developing the rules of a corporation, but anyone needing legal advice should get their own independent, professional legal advice.



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 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.

The CATSI Regulations have not yet prescribed an amount.

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 is members, with at least members 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 have directors, with each group appointing directors.

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.**