



Australian Government
Attorney-General's Department

Native Title Reforms

FACT SHEET # 2

PRESCRIBED BODIES CORPORATE

INTRODUCTION

The Australian Government has released exposure draft legislation proposing reforms to the native title system for public consultation. The Native Title Legislation Amendment Bill 2018 and the Registered Native Title Bodies Corporate Legislation Amendment Regulations 2018 would amend the Native Title Act 1993 and other related legislation and regulations to implement recommendations from a number of independent reviews, and to improve the native title system for all parties.

This fact sheet provides an overview of key PBC-related amendments in the exposure draft legislation. The main objective of these reforms is to improve PBC governance by enhancing transparency to native title holders and to provide clear pathways for resolution of disputes within the native title group. PBCs are a unique type of corporation as they have obligations beyond their membership to the broader native title group.

There is also a general fact sheet which provides an overview of reforms that impact other stakeholders such as native title claimants whose native title has not yet been determined (see the **Fact Sheet # 1 – Overview of reforms**). A more detailed explanation of all the reform proposals is available on the [Attorney-General's Department](#) website.

IMPROVING PBC GOVERNANCE

MEMBERSHIP

What is changing?

The government proposes to stop PBCs from arbitrarily denying or cancelling membership of people who otherwise meet the membership criteria.

The government also intends to add a requirement that the criteria for membership of the PBC must reflect the native title determination.

What does this mean for PBCs?

PBC directors will be able to determine whether a person is eligible for membership, but their discretion to withhold membership to persons who are meeting the membership criteria will be removed.

PBCs would no longer be able to add their own grounds for cancelling membership to their rule book. Grounds for cancellation would be limited to those provided for under the current law, i.e. where the member is not eligible for membership, has ceased to be eligible for membership, has not paid the membership fees (if any), is uncontactable, not an Aboriginal or Torres Strait Islander person or has misbehaved.

What does this mean for native title holders?

If you want to become a member of your PBC, you meet the eligibility criteria and you have applied for membership in the required manner, the PBC directors must accept your application.

If you are a member, your PBC would only be able to cancel your membership if you do something that meets the grounds for cancellation under current law (as described above, such as misbehaviour, failure to pay membership fees etc). The PBC cannot add further grounds for cancellation to the rule book.

CONSULTATION AND CONSENT REQUIREMENTS

What is changing?

The government is adding to the class of native title decisions about which native title holders can give their PBC 'standing instructions': standing instructions will now be able to be given in relation to decisions to enter agreements where the PBC is the instigator and beneficiary of the agreement. This means that the PBC does not have to go through a time-consuming and costly consultation process each time it wants to enter this type of agreement.

Example – using standing instructions: A PBC manages native title over an area that is rich in minerals. The PBC has set up an exploration business. It plans to apply for a number of exploration licences over the next three years. The Native Title Act 1993 requires an Indigenous Land Use Agreement (ILUA) or section 31 agreement between the PBC and the state or territory government every time the PBC applies for an exploration licence. Currently, the PBC would need to consult with and seek the consent of the native title holders before it could enter into such agreements, just like with any other ILUA or section 31 agreement. The proposal would allow native title holders to give their PBC standing instructions to enter into exploration agreements without having to come back to the native title holders each time a new agreement is proposed. The standing instructions would only be for agreements where the PBC has applied for the exploration licence. For agreements with other (external) explorers, the PBC would still need to consult the native title holders and seek their consent.

Another reform is to remove the requirement that PBCs must consult with their native title representative body (NTRB) before they can make a native title decision. PBCs can still consult with their NTRB if they wish, but it would no longer be a mandatory requirement.

What does this mean for PBCs?

The reform reduces the administrative burden on PBCs and the time and cost of following the consultation and consent process. PBCs may be able to make certain decisions without going back to the native title holders to obtain their consent, so long as the native title holders have provided the PBC with standing instructions to do so.

PBCs would also no longer be required to consult with their NTRB before making decisions about native title but could continue to do so if they wish.

What does this mean for native title holders?

As native title holders, you would be able to give standing instructions to your PBC to make certain decisions on your behalf so you don't have to be consulted and give your consent every time. Native title holders would also be able to revoke or put conditions on these standing instructions at any time.

DOCUMENTING NATIVE TITLE DECISIONS

What is changing?

PBCs would be required to document native title decisions in a certificate that includes the details of the consultation and consent process and is available to native title holders on request. The aim of sharing information in this way is to reduce disputes about native title decisions made by the PBC and increase transparency for native title holders. Currently, documentation is by individual native title holders not the PBC, and is not mandatory.

If asked, the Registrar of Indigenous Corporations would be able to assess whether or not these certificates comply with the requirement in the regulations to document native title decisions. The Registrar would not be able to intervene in PBC decision-making.

What does this mean for PBCs?

PBC directors would be required to document and certify in writing native title decisions. The certificates would not be publically available but would need to be provided to, for example, native title holders and the Registrar of Indigenous Corporations on request.

What does this mean for native title holders?

Whether or not you are a member of a PBC, you would be able to access the certificate. This might assist with any questions you may have about the decision and could avoid the escalation of disputes. You could also ask the Registrar for Indigenous Corporations for assistance.

MAKING A COMPENSATION CLAIM

What is changing?

The government is proposing to enable PBCs to lodge compensation claims where native title has been *fully* extinguished. At present, PBCs can only claim compensation where native title has been *partially* extinguished, not fully extinguished – a claim for compensation where native title has been fully extinguished must be brought by an authorised compensation claim group.

What does this mean for PBCs?

PBCs would be able to file a claim for compensation on behalf of the native title holders over areas that have been fully (and partially) extinguished, provided they have the consent of the native title holders to do so. This

would mean there is no need to have a separately authorised compensation claim group alongside the PBC when making a compensation claim.

What does this mean for native title holders?

PBCs would be required to consult with you, and obtain your consent, before making a compensation claim. Having a single claimant for compensation claims also means that the claims process is more straightforward.

IMPROVING PATHWAYS FOR DISPUTE RESOLUTION

According to ORIC statistics, PBCs are subject to a relatively large number of disputes. This is not surprising given the early stage of development of many of the corporations, and the responsibilities of the PBC under both Australian and traditional law. The reforms aim to increase the pathways available for dispute resolution.

PBC-DESIGNED DISPUTE RESOLUTION

The government proposes a new requirement that PBC rule books include a process for resolving disputes with native title holders who are not members of the PBC. The process would be designed by the PBC so it meets their needs and circumstances. Currently rule books are only required to include a dispute resolution clause for disputes with members.

This reform aims to resolve disputes early and internally, before the PBC needs to obtain costly legal advice or the dispute escalates further to the Federal Court.

What does this mean for PBCs?

PBCs would need to review and update their rule books to include a clause which sets out a dispute resolution process for disputes with native title holders who are not members of the PBC.

Example – PBC-designed dispute resolution process for non-members: *The new clause could, for example, provide that the dispute has to be considered by an Elders Council or put to a general meeting for the members of the PBC to decide. The PBC would need to think about a dispute resolution process that meets its needs and, where relevant, complies with traditional laws.*

What does this mean for native title holders?

If you are not a member of the PBC and have a dispute with your PBC, you would be able to pursue the dispute resolution process for non-members as set out in the PBC's rule book.

APPOINTING A SPECIAL ADMINISTRATOR TO PBCs

What is changing?

The government proposes to add a new ground for appointment of a special administrator – where the PBC was conducting its affairs in a way that was contrary to the interests of the native title holders. This ground recognises the obligations of PBCs beyond its membership to the broader native title group.

Under current law, the Registrar of Indigenous Corporations can appoint a special administrator on a range of grounds to provide early proactive regulatory assistance when a corporation experiences financial or governance difficulties. These grounds include where the PBC is not acting in the interests of its members, but do not include where the PBC is not acting in the interests of the broader native title group.

What does this mean for PBCs?

PBCs would need to ensure they were acting in the interests of both members and the native title holders generally.

One reason why the Registrar may find that a PBC is not acting in the interests of native title holders is if the PBC does not comply with its consultation and consent obligations. PBCs that do comply with statutory obligations to native title holders would be likely to be able to demonstrate that they were acting in the interests of native title holders.

Note that the Registrar will usually rely on more than one ground, and considers a range of relevant factors.

What does this mean for native title holders?

Native title holders who are concerned about their PBC's management of their native title have a new mechanism for addressing these concerns. Special administration enables ORIC to provide early and proactive assistance to resolve a corporation's problems.

JURISDICTION OF COURTS

What is the proposed change?

The government is proposing changes to which court can hear and determine PBC-related court cases. Currently these cases can be brought in a number of courts. The proposal is that PBC-related cases can only be brought in the Federal Court. This proposal recognises that the Federal Court, having been involved in native claims for more than 20 years, has developed unique expertise to deal with and resolve matters affecting PBCs.

What does this mean for PBCs and native title holders?

If you were to bring a case before a court, or were required to go before a court, you would likely have the matter heard in the Federal Court by an experienced native title judge.

NATIONAL NATIVE TITLE TRIBUNAL

What is the proposed change?

To further improve dispute resolution pathways the government also proposes to provide the National Native Title Tribunal (NNTT) with a new function to provide direct assistance to PBCs and native title holders. The aim of this reform is to promote agreement about native title issues. Under the current law, the NNTT can only assist when invited by native title representative body or service provider to do so.

What does this mean for PBCs and native title holders?

PBCs and native title holders will be able to approach the NNTT for assistance to reach agreement on a range of native title issues. This could include assistance around the establishment of governance processes for a PBC, and for the mediation of disputes that arise between the PBC and native title holders.