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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).

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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.

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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.

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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.

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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).