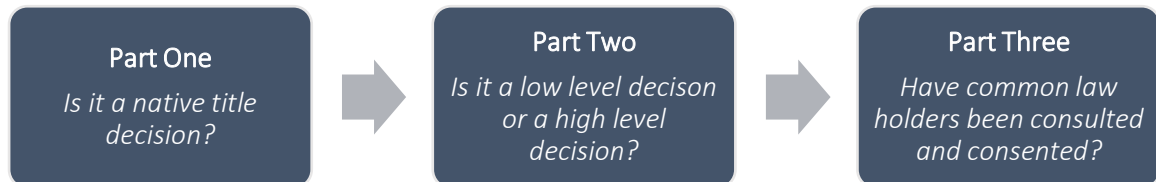


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Native title decision making under the PBC Regulations.

This document provides guidance on native title decision making under the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth) (**the Regulations**). This document contains three parts:



Part 1: is the decision a ‘native title decision’?

A **native title decision** is a decision:

- (a) to surrender native title rights and interests in relation to land or waters; or
- (b) to enter an indigenous land use agreement under Subdivision B, C or D of Division 3 of Part 2 of the *Native Title Act 1993* (Cth) or an agreement under Subdivision P (right to negotiate) of that Division; or
- (c) to allow a person who is not a common law holder, or a class of persons who are not common law holders, to become members of a prescribed body corporate; or
- (d) to include one or more consultation processes in the constitution of a prescribed body corporate; or
- (e) to do, or agree to, any act that would otherwise affect the native title rights and interests of the common law holders (other than a decision to make a compensation application).¹

If the decision is a native title decision, proceed to **Part Two**.

Refer to the MPS Law native title decision checklist for practical guidance on consultation with, and seeking the consent of, common law holders available on our website.

¹ *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth) reg 3 (definition of ‘**native title decision**’) (PBC Regulations).

Note: This document is intended as a guide only, to assist with the facilitation of native title decisions in accordance with the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth). This does not constitute legal advice. The issues and questions set out are of a general nature and may not reflect your specific circumstances. There may be additional and important issues that should be considered when considering your unique circumstance. If you or your organisation has a legal problem you should obtain professional advice from a legal practitioner.

Part 2: is this a low or high level decision?

Decisions that fall within categories (a) – (d) are **high level decisions**.² Decisions that fall within category (e) are **low level decisions**.³ A registered native title body corporate (**RNTBC**) must consult with and obtain the consent of the common law holders before making a native title decision.⁴

The process under the Regulations for making a native title decision is different depending on whether the decision is a high level decision or low level decision. The information below sets out the process for native title decision making under the PBC Regulations.

Once the category of decision is clear, the RNTBC should follow the applicable decision-making process.

Low Level Decisions

Does the RNTBC have standing instructions from the common law holders?	<i>If yes</i> →	The decision is covered by an approval under sub-regulation 8(8) of the Regulations. ⁵
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Does the RNTBC have an alternative consultation process in their rule book?	<i>If yes</i> →	The decision can be made under regulation 8A of the Regulations by following the consultation process set out in their rule book. ⁶
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If there are no standing instructions or an alternative consultation process, then the RNTBC must follow the consultation and consent process set out in sub-regulation 8(1) of the Regulations. See **Part Three**.

High level decision

Is the decision to:

- | | | | | |
|--|---------------|--|---------------|---|
| 1. enter into an indigenous land use agreement for the benefit of the RNTBC? | <i>If yes</i> | Does the RNTBC have standing instructions from the common law holders? | <i>If yes</i> | The decision is covered by an approval under sub-regulation 8(8) of the PBC Regulations. ⁷ |
| OR | | | | |
| 2. enter into a section 31 agreement and the RNTBC is the proponent? | | | | |

If the decision is not a decision to enter into an ILUA for the benefit of the RNTBC or enter into a section 31 agreement where the RNTBC is the proponent, or if the decision is to enter into an ILUA for the benefit of the RNTBC or enter into a section 31 agreement where the RNTBC is the proponent but there

² PBC Regulations reg 3 (definition of 'high level decision').

³ PBC Regulations reg 3 (definition of 'low level decision').

⁴ PBC Regulations sub-reg 8(1).

⁵ PBC Regulations reg 3 (definition of 'standing instructions decision') and sub-reg 8(8).

⁶ PBC Regulations sub-reg 8(2) and reg 8A.

⁷ PBC Regulations reg 3 (definition of 'standing instructions decision') and sub-reg 8(8).

are no standing instructions from the common law holders, then the RNTBC must follow the consultation and consent process set out in Regulation 8(1) of the PBC Regulations. See **Part Three**.

Part 3 – Is consultation and consent required?

Consultation and consent of common law holders is required where the native title decision is not covered by standing instructions or an alternative consultation process approved by the Regulations:

Who does the RNTBC need to consult? ⁸

- If the relevant Native Title Determination identifies classes of common law holders, then the RNTBC must consult with and obtain the consent of those classes who would be affected by the decision.
- If the relevant Native Title Determination does not identify classes of common law holders, then the RNTBC must consult with and obtain the consent of the common law holders as group.

What is the process for providing consent? ⁹

- If the common law holders have a traditional decision-making process that must be followed under traditional law and custom, then consent must be made in accordance with that process.
- If the common law holders do not have a mandatory traditional decision-making process, then the consent must be given in accordance with the process of decision-making agreed to, or adopted, for the proposed native title decision.

Refer to the MPS Law native title decision checklist for practical guidance on consultation with, and seeking the consent of, common law holders available on our website.

⁸ PBC Regulations sub-reg 8 (1), 8(3) and 8(4).

⁹ PBC Regulations sub-reg 8(3) and 8(4).