

# APLS LAW

Native title decisions



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This document is intended as a guide only. This does not constitute legal advice. There may be additional and important considerations that should be taken into account in your specific circumstances. If you or your organisation has a legal issue, you should obtain professional advice from a legal practitioner.

# What is a native title decision?

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**Native title decisions are decisions that affect native title rights and interests. The PBC Regulations set out a definition of native title decision, being a decision to:**

- **(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).<sup>1</sup>

**Decisions that fall within the above categories (a)-(d) are high level decisions.<sup>2</sup> Decisions that fall within above category (e) are low level decisions.<sup>3</sup>**

# What is the bottom line?

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**Before making a native title decision, whether it is a high level decision or low level decision, the PBC must consult with and obtain consent of the common law holders.<sup>4</sup>**

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

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

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

4. PBC Regulation sub-reg 8(2) and 8A.

# How does the PBC consult with and obtain consent from native title holders?

For some native title decisions, the PBC can rely on standing instructions or an alternative consultation process to satisfy the consultation and consent requirements. For all other native title decisions, the PBC must consult with and obtain consent from the relevant native title holders by following the standard process.

	Process that satisfies the consultation and consent requirement	Type of native title decisions to which the process applies	Regulation
a)	Standing instructions (where they have been provided by the relevant native title holders in accordance with the PBC Regulations)	Low level decisions	8(8) and 3
b)	Standing instructions (where they have been provided by the relevant native title holders in accordance with the PBC Regulations)	A high level decision to: <ol style="list-style-type: none"> <li>1. enter into an indigenous land use agreement for the benefit of the PBC; or</li> <li>2. enter into a section 31 agreement where the PBC is the proponent.</li> </ol>	8(8) and 3
c)	Alternative consultation process (where available in the PBC rule book)	Low level decisions	8A
d)	Standard consultation and consent process	All low level and high-level decisions not covered by (a), (b) and (c) (standing instructions or an alternative consultation process).	8(1)

# What is the standard consultation and consent process?

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## Who does the PBC need to consult?

- If the relevant native title determination identifies classes of native title holders, then the PBC 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 native title holders, then the PBC must consult with and obtain the consent of the native title holders as group.



## What is the decision-making process for providing consent?

- If the native title 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 native title 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.