

MPS

LAW

**Overview of native title and
incorporating a PBC**



Contents

| | |
|---|------------|
| What is native title? | 2 |
| How is native title recognised? | 2 |
| What is a ‘prescribed body corporate’? | 3 |
| How is a PBC incorporated? | 4/5 |

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 native title?

- Native title is a process under Australian law that recognises that Aboriginal and Torres Strait Islander people are the traditional owners of their country.
- Native title is not the same as owning land under Australian law. Native title recognises rights under traditional law and custom that are held collectively by the native title group. These include rights such as to:
 - ◇ access or camp on country
 - ◇ make a campfire
 - ◇ hunt or fish
 - ◇ collect natural resources for traditional purposes
 - ◇ visit, protect, or take care of sacred sites
 - ◇ perform ceremonies
 - ◇ transfer knowledge to young people
- When an area of country is covered by a native title claim or determination, if a mining company, government or other third party want to do something on that area, they may need to talk to, listen to, or negotiate with traditional owners first.

How is native title recognised?

- Traditional owners can apply to the Federal Court to have their native title recognised in a native title determination.
- To be successful in a claim, native title claimants (the traditional owners) must prove that they are the right people for that part of country and that they still have a connection to their country under traditional law and custom.
- A native title determination will list the native title rights and interests recognised by the Federal Court.
 - ◇ If native title is “exclusive” then native title holders can stop people coming to their country
 - ◇ If native title is “non-exclusive” then native title holders share their country with others. For example, if the native title area is also covered by a pastoral station, then native title holders will share their country with the pastoralist.

What is a ‘prescribed body corporate’?

- If the native title claim is successful, the native title holders must nominate an Aboriginal corporation to either hold or manage their native title. This is called a prescribed body corporate, or a PBC.
- To do this, the native title holders ask the Federal Court to determine that the Aboriginal corporation they nominated should be the PBC for the native title determination. Generally, the Court will require a PBC to be determined at the same time as the native title determination.
- The Native Title Act 1993 (Cth) says that the Indigenous Land and Sea Corporation (ILSC) may become the default PBC. if a group cannot nominate one. While it is unlikely the Court will make a determination of native title without determining a PBC at the same time, if the ILSC becomes the default PBC, then the native title holders lose direct control of management of their native title.
- Native title holders, members and directors all have a role in the PBC carrying out its functions. The members and directors run the operations of the PBC and have an obligation to speak to the native title holders about native title decisions.
- All native title holders must be represented in the PBC through the membership rules, either directly or indirectly.
- The members and directors must follow the rule book and native title legislation. The rule book includes rules about becoming a member or director of the PBC and how decisions are made.
- Once the PBC is nominated it becomes the job of the PBC to deal with native title, not the claim group. The PBC is the contact point for people who want to do something on the native title area.

How is a PBC incorporated?



Nominate a Working Group

The claim group decides whether they need to create a new Aboriginal corporation to be the PBC. If they are going to form a new Aboriginal corporation to be the PBC, then the claim group decides how they are going to draft the rule book and organise its incorporation. Claim groups often decide to nominate a working group or instruct the Applicant to do this work.¹ The claim group should give the working group and Applicant clear instructions about what they can and cannot do.



Draft the corporation rule book

The working group meets to draft the rule book and nominate a name for the Aboriginal corporation that will become the PBC. The working group needs to think about things like the structure of the corporation, the decision-making process for the corporation, membership eligibility and the process for nominating and appointing directors.² The rule book can modify some of the default rules for PBCs set out in the legislation (the replaceable rules).



Draft and send the pre-incorporation

A notice is sent to native title holders notifying that a pre-incorporation meeting will be held where native title holders will be asked to:

- consent in writing to being a member on registration
- authorise the application for incorporation
- approve the name of the corporation
- approve the rule book and any modification to the replaceable rules; and
- nominate directors and a contact person.³

The directors nominated as part of the registration process will only hold that position until the first Annual General Meeting (AGM).⁴



Hold the pre-incorporation meeting

At least 75% of the native title holders listed in the application for registration must have consented to the pre-incorporation requirements set out in the notice. Anyone that signs up to be a member or is appointed as a director or contact person must consent to those positions in writing.



Submit incorporation documents to ORIC

Submit application for registration to the Office of the Registrar of Indigenous Corporations. The application must include specific information including the corporation's name, the size of the corporation, the names and addresses of each person who consents in writing to become a member of the corporation, the details of each person who consents in writing to become a director and be accompanied by evidence of that at least 75% of the native title holders registered in attendance at the pre-incorporation meeting consented to the decisions made at the meeting. ⁵



Hold first meetings of the corporation

The PBC must hold the first directors' meeting within within the time specified in its rule book, and the first members' meeting within three months of being registered. The Aboriginal corporation must also pass a resolution consenting to be the PBC. The PBC must also hold an AGM within five months of the end of its financial year. New directors will be nominated and appointed at the first AGM.



Nominate the new corporation to be the PBC

A claim group meeting is held to formally nominate the Aboriginal corporation to be the PBC. The details of the nominated PBC are then notified to the Court so that the PBC can be included in the native title determination.



Add "RNTBC" at the end of the corporation's

Once Federal Court determines the Aboriginal corporation as the PBC and ORIC is notified that the determination is made, "RNTBC" is inserted at the end of the name of the corporation. RNTBC stands for registered⁶ The PBC must also hold an AGM within five months of the end of its financial year.⁷ New directors will be nominated and appointed at the first AGM.⁸

1. CATSI Act, ss 141-1(3) and 8(8).

2. See list of internal governance rules: CATSI Act, s 57.5.

3. See pre-incorporation requirements: CATSI Act, s 29.15.

4. CATSI Act s 246-25.

5. CATSI Act, s 21.1

6. CATSI Act, s 201-145.

7. CATSI Act, s 201-150.

8. CATSI Act, s 246-25.