



Australian Government
National Indigenous
Australians Agency



NIAA

Information on changes to native title laws and obligations

Details

Working with Aboriginal and Torres Strait Islander peoples



Background

On 3 February 2021, the Australian Government passed the *Native Title Legislation Amendment Act 2021* (Amendment Act).

- The Amendment Act makes changes to the *Native Title Act 1993* (NTA) and *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (CATSI Act).

The Government also made changes that affect Prescribed Bodies Corporate (PBCs) in the *Registered Native Title Bodies Corporate Legislation Amendment Regulations 2021* (Amendment Regulations).

- The Amendment Regulations mainly change the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (PBC Regulations). They also make some consequential changes to the *Corporations (Aboriginal and Torres Strait Islander) Regulations 2017* and *Native Title (Indigenous Land Use Agreements) Regulations 1999*.

These changes introduce new rules and requirements for PBCs, including the requirement for existing PBCs to amend their rule books. The starting date for these changes is 25 March 2021. Existing PBCs have two years to make the rule book changes.

This factsheet provides a detailed summary of the changes and includes reference to the relevant section/regulation in the amended Native Title Act/CATSI Act/PBC Regulations/CATSI Act Regulations and the Replacement Revised Explanatory Memorandum (EM) for the Amendment Act /Explanatory Statement (ES) for the Amendment Regulations for further details.

More information about the amendments can be found on the [Changes to Native Title legislation affecting Prescribed Bodies Corporate \(PBCs\) page](#) on the NIAA website.

1. PBC related changes in the CATSI Act and NTA

Federal Court

All PBC-related court matters under the CATSI Act must be commenced in the Federal Court.

Before the amendment, the Federal Court had exclusive jurisdiction (other than the High Court) to hear and determine native title applications. However, this did not extend to PBC-related civil matters which may also be heard by State and Territory courts.

Now, after the amendment, in addition to having exclusive jurisdiction for native title matters, all civil PBC-related matters under the CATSI Act must also commence in, and be determined by, the Federal Court, unless the Federal Court transfers them to another court.

This means the Federal Court will be able to apply its native title expertise, case management tools and strategies for resolving disputes in relation to native title applications, which it has developed over more than two decades nationally, to disputes involving PBCs under the CATSI Act.

Refer to section 581-30 CATSI Act – EM page 75.

Compensation applications

PBCs can make applications for compensation in relation to more areas where native title rights and interests have been impacted.

Before the amendment, PBCs could only make applications for compensation over areas where native title was partially extinguished or impaired. For fully extinguished native title, the claimants needed to authorise an applicant to make the compensation application.



Now, after the amendment, a PBC can also make an application for compensation over areas where native title is fully extinguished. However, this can only occur if the area (i.e. the fully extinguished area) is within the external boundary of the PBC's native title determination area.

This means PBCs can bring more types of compensation applications and common law holders have more options for making such applications.

Note: there is a complementary amendment to the PBC Regulations requiring that before a PBC makes a compensation application, it needs to consult with and seek the consent of the relevant common law holders – see below.

Refer to section 61(1) NTA – EM page 54.

PBC rule books

PBC rule books must include a new dispute resolution clause

Before the amendment, PBCs, like all other CATSI Act corporations, were required to have in their rule book a dispute resolution process to resolve any disputes about the 'internal operation' of their PBC. The disputes covered by this clause are between: members; members and directors, or directors of the PBC. This clause does not cover persons who are not members of the corporation e.g. common law holders who have not sought to become members or persons who claim to be common law holders but their membership application has not been accepted by the PBC.

Now, following the amendment, PBCs must also include a clause or clauses providing for the resolution of disputes between the PBC and a person who is or who claims to be a common law holder (whether or not the person is a member of the corporation). The disputes that are to be covered by the new dispute resolution clause(s) are about:

- whether or not the person is a common law holder; and
- the PBC's performance of its functions under the native title legislation (for example a dispute about whether a PBC has invested money held in trust as directed by the common law holders).

This means PBCs have a process to deal with disputes between the PBC and persons who are, or claim to be, common law holders, whether or not they are members of the PBC.

Refer to section 66-1 CATSI Act – EM page 66.

PBC membership

A PBC specific membership eligibility criteria requirement has been introduced; the discretion of PBC directors about membership applications has been removed; PBCs' rule books must not provide for grounds and processes to cancel membership other than as provided for in the CATSI Act.

Who can be a member of the PBC

Before the amendment, PBCs, like all other CATSI Act corporations, were able to include in their rule books their own eligibility criteria for membership. The CATSI Act sets out basic requirements, including that all members must be at least 15 years old.

Now, following the amendment, there is a specific requirement for PBCs in relation to their membership eligibility: PBCs must now have eligibility requirements that provide for all common law holders to be represented within the PBC, either directly (for example, through personal membership of the PBC) or indirectly (for example, a single family member may become a member of the PBC to represent an entire family group of common law holders).



This means PBC cannot change eligibility requirements to arbitrarily exclude some common law holders from membership.

Note: When making the choice about indirect or representative membership, the circumstances of common law holders including their laws and customs and their cultural practices, and practical issues like the cost and logistics of bringing together members should be considered.

Refer to section 141-25 CATSI Act – EM page 68.

How to become a member

Before the amendment, PBC directors were able to refuse to accept membership even where an applicant meets the eligibility requirements and applies for membership in the required manner (generally in writing).

Now, following the amendment, this discretion to refuse membership has been removed in relation to PBCs.

This means directors of a PBC must accept a membership application where the applicant applies for membership in the required manner and the applicant meets the eligibility requirements of the corporation. Where these requirements are not met, directors can still refuse membership. The amendment removes the risk that directors arbitrarily refuse membership and intends to reduce disputes about membership applications not being handled correctly.

Note: It is very important to understand that common law holders do not automatically become a member of a PBC. The CATSI Act says that persons who want to become a member of a PBC need to apply in writing, meet the membership criteria, have their application accepted, and be entered on the register of members.

Refer to section 144-10 CATSI Act – EM page 73.

Cancelling membership

Before the amendments, PBCs were able to create their own grounds for cancelling a membership in addition to the grounds set out in the CATSI Act.

Now, after the amendment, PBCs, unlike other CATSI Act corporations, can no longer have their own cancellation grounds. The grounds available to PBCs for cancelling a membership are limited to those set out in the CATSI Act:

- a. the member is ineligible for membership or has failed to pay fees (under section 150-20 of the CATSI Act);
- b. the member is uncontactable (under section 150-25 of the CATSI Act);
- c. the member is not an Aboriginal and/or Torres Strait Islander person (under section 150-30 of the CATSI Act); and
- d. the member has misbehaved (under section 150-35 of the CATSI Act).

The CATSI Act also sets out the process by which a PBC is to cancel a membership.

This means that PBCs cannot create grounds that would allow them to arbitrarily cancel the membership of certain persons or a group of members and must follow the procedures for cancellation as set out in the CATSI Act.

Refer to section 150-20 CATSI Act – EM page 69.

National Native Title Tribunal

The National Native Title Tribunal (Tribunal) can assist PBCs and common law holders, including with mediation.

Before the amendment, the Tribunal did not have a specific function to assist PBCs or common law holders directly.



Now, after the amendment the Tribunal can provide assistance to common law holders and PBCs. Both are able to approach the Tribunal, including for support in relation to disputes between common law holders and PBCs, which may include mediation.

This means common law holders and PBCs have a further mechanism that helps them with the management of post-determination native title disputes.

Note: Although the function will allow the Tribunal to provide support in relation to PBC disputes, it is expected that PBCs will go through their own dispute resolution processes in their rule books before seeking the assistance of the Tribunal. This aligns with the new requirement for PBCs to add a dispute resolution clause to their rule book in relation to disputes between the PBC and persons who are, or claim to be, common law holders. See above for details.

Refer to section 60AAA NTA - EM page 65.

Special administration

The Registrar of Indigenous Corporations (Registrar) can place a PBC under special administration if it breaches its native title legislation obligations – seriously or repeatedly.

Before the amendment, the Registrar was already able to place PBCs under special administration for grounds which apply to *all* CATSI Act corporations. However, there was no specific ground for PBCs which reflected the special obligations PBCs have to common law holders, in addition to the obligations PBCs have to their members under the CATSI Act.

Now, following the amendment, there is a PBC-specific ground to place a PBC under special administration where there has been a serious or repeated failure by a PBC to perform its native title legislation obligations. Possible examples of a **serious** failure may include:

- a PBC has failed to consult a relevant group of common law holders (such as a particular family group) and the failure has a serious impact for that group; or
- a PBC has used a substantial amount of money held in trust without obtaining the directions of the common law holders.

A PBC may also be placed under special administration for **repeated** failures, where a PBC has failed to comply with its native title legislation obligations on a number of occasions. However, it is not intended that this ground be used in circumstances of multiple inadvertent and trivial breaches. The nature or cumulative consequences of the series of failures would have to be more than trivial.

This means that common law holders who are concerned about their PBC's management of their native title have a further mechanism for addressing these concerns.

Note: The appointment of a specialist independent person can assist PBCs in resolving governance issues and are demonstrated mechanisms for ensuring the viability of a corporation.

Refer to Section 487-5 CATSI Act – EM page 74.

2. PBC related changes in the PBC Regulations and CATSI Regulations

Native Title decisions

The regulations more clearly define ‘native title decisions’ and describe how they are to be made.

Before the amendment, definitions for ‘native title decision’ were in multiple sections in the PBC Regulations and some stakeholders were unclear about the consultation and consent requirements for these decisions, in particular in relation to who needed to be consulted when there are subgroups of common law holders.

Now, after the amendment all types of native title decisions are brought together under one definition in regulation 3(1). The concepts of high level and low level decisions (subcategories of native title decisions) have also been introduced and the relevant consultation and consent process (under regulations 8 or 8A) that applies to these decisions, is clearly set out. Regulation 8 also has been redrafted to clarify the consultation and consent requirements when a determination identifies classes of common law holders.

This means the regulations that relate to consultation and consent requirements for native title decisions are easier to understand and give clear guidance in respect of their implementation.

Note: To assist PBCs, NIAA has published a Discussion Paper on PBC decision making, certification and fees for service under the PBC Regulations which includes flowcharts. The Discussion Paper can be found on the [Changes to Native Title legislation affecting Prescribed Bodies Corporate \(PBCs\) page](#) on the NIAA website.

Refer to regulations 3(1) and 8 – see pages 4-6 and 9-10 of the Explanatory Statement (ES) to the Amendment Regulations for additional information.

Compensation applications

PBCs must consult the relevant common law holders and obtain their consent in relation to the making of the application.

Before the amendment, the PBC Regulations did not include an express consultation and consent requirement for when a PBC wanted to make a compensation application.

Now, after the amendment, regulation 8B sets out consultation and consent requirements, which are similar to the requirements for native title decisions in regulation 8.

This means common law holders have a say before a compensation application is made by their PBC and decision-making around compensation applications is more transparent.

Note: This amendment relates to the changes to the NTA which broaden the circumstances in which a PBC can make a compensation application – see discussion in the CATSI Act section above.

Refer to regulation 8B PBC Regulations – ES page 11.

Certificates

A Certificate must be issued for every native title decision and decision to make a compensation application; common law holders, persons with a substantial interest in the decision and the registrar can request a copy of the certificate.



Before the amendment, PBCs could, but did not have to, issue a certificate when making a native title decision and there was no certification requirement for making a compensation application. If a certificate was issued, it was regarded as evidence that the consultation and consent requirements were met. The certificate had to be signed by at least five members of the PBC who were also common law holders affected by the native title decision. If there were not enough affected common law holders, then other members of the PBC had to sign the certificate.

Now, following the amendment, a certificate must be issued for every native title decision that the PBC makes and for a decision to make a compensation application. The certificate must include certain information about the consultation and consent process and which common law holders participated. The certificate is prima facie evidence that the PBC has consulted, and obtained the consent of, the common law holders. It must be executed by the PBC in accordance with the CATSI Act or can be signed by its CEO (if the PBC has a CEO). A copy of the certificate can be accessed by the Registrar, common law holders or persons that have a substantial interest in the decision to which the certificate relates.

This means there is more transparency around PBC native title and compensation claim decision-making for common law holders and increased PBC accountability.

Refer to regulations 9 and 10 PBC Regulations – ES page 13.

Assessing Certificates

The Registrar of Indigenous Corporations has a new power to assess whether a certificate has been validly issued and can make a non-binding finding.

Before the amendment, the registrar often had no information available to them when common law holders asked for assistance or raised a concern about a native title decision made by a PBC.

Now, after the amendment, a PBC certificate must be made available to the Registrar by the PBC on request. The Registrar has the power to make a non-binding assessment of the certificate's compliance with the PBC Regulations (i.e. whether it contains all the required information and is signed according to the requirements).

This means the Registrar can assist common law holders with information, found in the certificate, about a particular PBC native title or compensation application decision. This in turn may avoid the escalation of a complaint or dispute.

Note: A PBC's refusal to properly prepare a certificate would be a relevant consideration in deciding consequent regulatory action by the Office of the Registrar of Indigenous Corporations (ORIC) under the CATSI Act, in particular consideration of the new special administrator power for PBCs – see discussion above in the CATSI Act changes section.

Refer to regulation 55A CATSI Regulation, regulation 10 PBC Regulations - ES pages 2 and 14.

Consulting the NTRB/SP

Consulting the NTRB/SP is no longer required when a PBC is making a native title decision.

Before the amendment, PBCs, in addition to consulting with common law holders and obtaining their consent, also had to consult with, and consider the views of, the relevant NTRB/SP before making a native title decision. In practice, this requirement was not always met and often NTRBs/SPs were not in a position to comment on the native title decision at hand where they had not been involved in the negotiations.

Now, after the amendment, PBCs can continue to seek their NTRB's/SP's views, but they do not have to if they choose not to.

This means a streamlining of PBC native title decision-making.



Refer to former regulation 8(2) removed – ES page 5.

Standing instructions

Common law holders can give their PBC standing instructions about certain native title decisions (being decisions to enter into agreements where the PBC itself will benefit from the doing of an act or is the only grantee party).

Before the amendment, PBCs needed to consult with, and seek the consent of common law holders when making a decision to enter into an Indigenous Land Use Agreement (ILUA) or section 31 agreement under the NTA when the PBC itself was the beneficiary or grantee party of the agreement.

Now, after the amendment, common law holders can give their PBC standing instructions for ILUAs in relation to an act by or for the benefit of the PBC or a section 31 agreement in relation to which the PBC is the only grantee party. Common law holders are able to withdraw their standing instructions at any time or to put conditions on them. If such instructions are given (and the relevant conditions met), the PBC does not need to consult or obtain consent in relation to decisions covered by the instructions.

This means that decision-making in relation to these types of agreements is streamlined, if common law holders agree to provide standing instructions. This will avoid time-consuming and costly consultation processes each time a PBC wants to enter such agreements.

Example: The PBC has set up an exploration business. It plans to apply for several exploration licences over the next three years. The amendments allow common law holders to give their PBC standing instructions to enter into exploration agreements without having to consult and seek the consent of the common law 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 common law holders and obtain their consent.

Refer to regulations 3(1) and 8(2) and (8) – ES pages 5 and 11.