



Registered native title bodies corporate

Policy

PS-10: Registered native title bodies corporate

Relevant legislative provisions

CATSI Act sections 1-25 and 66-1, 187-5, Parts 3-4 and 4-2
Native Title Act 1993 (Cth)
Native Title (Prescribed Bodies Corporate) Regulations 1999 (Cth)

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Other relevant policies

PS-08: Corporation names
PS-22: Disputes involving corporations



Contents

| | | |
|----|--|---|
| 1. | Purpose | 3 |
| 2. | Native title status..... | 3 |
| 3. | Agreement between the National Native Title Tribunal and the Registrar | 4 |
| 4. | Internal governance rules and rule books | 4 |
| 5. | Common law holder membership | 4 |
| 6. | Deciding membership applications | 6 |
| 7. | Cancelling membership | 7 |
| 8. | Dispute resolution | 8 |

1. Purpose

- 1.1 In this policy statement, the Registrar of Aboriginal and Torres Strait Islander Corporations (the Registrar) provides guidance on the provisions of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (the CATSI Act) which relate to registered native title body corporates (RNTBCs).

2. Native title status

- 2.1 Under the *Native Title Act 1993* (Cth) an RNTBC must be registered under the CATSI Act to hold or manage native title rights and interests on behalf of common law holders. Accordingly, the CATSI Act recognises and makes special provision for those corporations which hold native title rights and interests.
- 2.2 A corporation becomes an RNTBC when it is nominated by the native title claimants and upon native title being determined by the Federal Court being registered on the National Native Title Register (NNTR) – then becoming the ‘registered’ native title body corporate.
- 2.3 Under the CATSI Act, an RNTBC is defined by reference to the *Native Title Act 1993* (Cth), which establishes a NNTR containing all RNTBCs’ names and addresses. The CATSI Act requires a corporation, which is also a RNTBC, to include in its name the words ‘registered native title body corporate’ or the abbreviation ‘RNTBC’ – sections 85-1(4) and 85-10. This signals to third parties that the corporation holds or manages native title rights and interests. For more information on corporation naming requirements, refer to ‘PS-08: Corporation names’.
- 2.4 If a corporation becomes an RNTBC under the *Native Title Act 1993* (Cth), the corporation must, within 28 days of it being registered on the NNTR, notify the Registrar in writing – section 88-10(1). When the Registrar is notified or otherwise becomes aware of the change, the Registrar must change the corporation’s name on the Register of Aboriginal and Torres Strait Islander Corporations (the Register) and include the words ‘registered native title body corporate’ in the corporation’s name – section 88-10(2).
- 2.5 Corporations becoming an RNTBC should ensure that its rule book reflects the native title determination. For example, this would include ensuring that the corporation reflects the membership and the rule book reflects the eligibility of the common law holders.
- 2.6 In addition, an Aboriginal and Torres Strait Islander corporation must notify the Registrar in writing, within 28 days, if it ceases to be an RNTBC – section 88-15(1). When the Registrar is notified or otherwise becomes aware of the change, the Registrar must change the corporation’s name on the Register by removing the words ‘registered native title body corporate’ – section 88-15(2).
- 2.7 Once the RNTBC has been registered, the Registrar may take steps to remove references to a prescribed body corporate (PBC) from other rule books that refer to the same determination. This is to ensure, in the public interest, that third parties have certainty which entity is the appropriate body to deal with on native title matters.

3. Agreement between the National Native Title Tribunal and the Registrar

- 3.1 To help facilitate notification of changes in native title status, the National Native Title Tribunal (the Tribunal) has agreed to notify the Registrar of any additions, amendments or deletions of RNTBCs on the NNTR. The Registrar will also notify the Tribunal of any amendments to the names of RNTBCs on the Register.
- 3.2 Once notified by the Tribunal of any change in status of a RNTBC the Registrar will change the corporation's name on the Register and issue a new certificate of registration to the corporation – section 88-20(1).
- 3.3 The Registrar also receives regular reports from the Tribunal regarding native title determinations made by the Federal Court, including the name (where known) of the RNTBCs which are to hold native title interests. The Tribunal will continue to provide the Registrar with these reports.

4. Internal governance rules and rule books

- 4.1 The CATSI Act sets out certain internal governance rules that are specific to RNTBCs which either replace or add to the rules set out for other corporations.
- 4.2 As with other corporations, RNTBCs must also comply with all other internal governance rules requirements set out in Part 3-2 of the CATSI Act.
- 4.3 The rule book of every RNTBC must be consistent with these requirements and must also be consistent with native title legislation – section 66-1(5) (c) and (d).

5. Common law holder membership

- 5.1 Common law holders do not automatically become a member of their RNTBC. It is up to a common law holder as to whether or not they also want to become a member of the RNTBC. Not being a member of their RNTBC does not affect a common law holder's native title rights and interests.
- 5.2 The rule book of every RNTBC must include eligibility requirements for membership that provide for all the common law holders of native title to be represented in the membership, either directly or indirectly – section 141-25(2). This requirement is intended to prevent common law holders from being arbitrarily excluded from membership and to provide opportunities for all common law holders to get involved in the management of their native title through the relevant RNTBC if they choose to become a member.
- 5.3 Section 141-25(2) is intended to ensure a corporation's rule book enables all common law holders to be represented **within** their corporation. This means that RNTBCs need to ensure their eligibility requirements provide for all common law holders to be represented either

directly or indirectly should they make an application for membership in accordance with the rule book.

- 5.4 Direct representation occurs where the eligibility requirements provide that each common law holder is eligible to be a personal member of the RNTBC.
- 5.5 Indirect representation may limit membership to one or a small number of people who represent the common law holders in each common law holder sub-group. For example, the rule book may have an eligibility requirement that allows for one or multiple people from each sub-group of common law holders to become members and thereby represent their sub-group in the membership of the corporation.
- 5.6 Persons who consider they are eligible for membership – either as a personal or representative member – must make an application in the form prescribed in the corporation rule book.
- 5.7 RNTBCs cannot impose additional eligibility requirements that would have the effect of excluding common law holders from being represented within the corporation. Examples of this may include residency, previous membership cancellations or whether they primarily identify as one family group or another.
- 5.8 RNTBCs are not permitted to permanently exclude a common law member from membership. This is inconsistent with the requirements of section 141-25(2).
- 5.9 The Registrar recognises the practical difficulties reconciling the eligibility requirements imposed by section 141-25(2) and the cancellation of membership provisions under section 150-35 that enable a corporation to cancel the membership of a common law holder who has ‘significantly interfered with operations of the corporation’.
- 5.10 It is not uncommon for RNTBCs to cancel the personal membership of a common law holder pursuant to the process set out in the rule book, only to then need to reconsider a fresh application for membership shortly thereafter. RNTBCs can consider managing this process by considering that the effect of section 141-25(2) does not prevent a corporation from cancelling the *personal* membership of a common law holder, so long as the corporation’s rule book provides a method for representative (indirect) membership. This ensures that a common law holder is still represented **within** the corporation.
- 5.11 RNTBCs can consider whether such common law holders are represented directly or indirectly, or a combination of both. This matter should be determined by the members and given effect in the corporation’s rule book. This is important because such representation can take many forms, and the members should decide what form works best in the context of their corporation.
- 5.12 A corporation will not comply with section 141-25(2) if it was to exclude an otherwise eligible common law holder from direct membership, where the membership eligibility requirements in its rule book do not also provide for indirect means of representation within the corporation. A decision maker is unable to register a rule unless they are satisfied it meets the internal governance rules requirement under section 66-1. Without appropriate provisions in the rule book, the RNTBC must consider, and accept, a fresh application for membership from any cancelled members who are otherwise eligible common law holders.

- 5.13 RNTBCs with predominantly direct representation models should also be aware that rules that exclude otherwise eligible common law holders from personal membership, and afford them only indirect representation for indefinite or extended periods of time, may be considered to amount to a form of practical exclusion from eligibility from personal membership. The Registrar encourages RNTBCs to consider provisions that provide such a common law holder a clear pathway back to obtaining direct representation.
- 5.14 RNTBCs are required to ensure the rule book contains rules that provide for all common law holders to be represented within the RNTBC, but it is a matter for the RNTBC as to how that representation is provided. The Registrar will carefully consider any such rule in accordance with the following relevant principles:
- The membership eligibility requirements for all RNTBCs must contain a mechanism that allows for all common law holders to be represented within the RNTBC.
 - There should be no rules on member eligibility elsewhere in the rule book other than under the section about member eligibility requirements.
 - Representation means to stand for someone, or to speak on behalf of someone.
 - The rule must be otherwise consistent with the CATSI Act.
 - The rule must be adequate and workable in the context in which the corporation operates.
 - Where the membership eligibility requirements provide a mechanism for indirect representation, that method of representative membership must be apparent on its face and sufficiently specific to provide certainty that all common law holders are able to be represented.
- 5.15 Where an otherwise direct model of representation is accompanied by an indirect representation model that applies to a class of persons (i.e. previously cancelled members or common law holders under the age of 18), indirect representation cannot be used in an arbitrary or permanent manner to exclude a person or class of common law holders from accessing the mode of representation afforded to others.
- 5.16 The mechanism for indirect representation must be apparent on its face. Some possible methods of indirect representation might be:
- the common law holder who has had their membership cancelled may choose their own representative who is also a member
 - the common law holder is indirectly represented as part of a collective of members (such as a family group), with collective interests or
 - the directors may choose one or more members to represent the common law holder who has had their membership cancelled.
- This is not an exhaustive list. RNTBCs should consult with the members about mechanisms that best meet the operations of the corporation and consult with the Registrar to ensure compliance with the CATSI Act.
- 5.17 Alternatively, corporations might consider rules that address the particular conduct of concern. For example, a RNTBC considering serious workplace health and safety issues may maintain a common law holder's personal representation, but the rule book provides a mechanism to limit or exclude their attendance at meetings in person, and only afford virtual attendance where physical attendance is otherwise permitted.

- 5.18 The Registrar encourages early consultation with their office if RNTBCs wish to have members consider a rule book change to exclude common law holders from direct representation for a period of time where they have had their membership cancelled. Such rules may need careful drafting and additional machinery clauses to make them workable.
- 5.19 RNTBCs should be aware that this part relates only to membership of the RNTBC. A common law holder who is subject to the provisions of the CATSI Act referred to in this section cannot, by reason of those provisions, be excluded from attending common law holder meetings or other consultation processes that may be required to be undertaken as part of an RNTBC's compliance with other legislation, including the *Native Title Act 1993* (Cth) and the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth).

6. Deciding membership applications

- 6.1 Unlike other corporations, the directors of a RNTBC must accept membership applications from persons who:
- meet the eligibility criteria for membership, and
 - apply for membership of the RNTBC in the manner the RNTBC's rule book requires – section 144-10.
- 6.2 The CATSI Act does not stipulate a time period within which the directors must decide membership applications. The RNTBC must determine what it considers to be a reasonable period, assessed objectively. The Registrar will carefully consider the reasonableness of any given time period on a case-by-case basis in the context of each RNTBC. In many circumstances, the Registrar considers a period of up to 6 months to be reasonable.
- 6.3 Where a person considers the RNTBC has taken an unreasonable amount of time to decide a membership application, they should take steps to initiate a dispute notice under the dispute resolution procedures in the RNTBC's rule book – see 'Dispute resolution' below.

7. Cancelling membership

- 7.1 An RNTBC can only cancel membership on the grounds set out in the CATSI Act, following the exact procedures set out in the CATSI Act. The grounds on which a RNTBC may cancel a person's membership are:
- the member is not eligible, or has ceased to be eligible, for membership – section 150-22(3)(a)
 - the member has failed to pay fees – section 150-22(3)(b)
 - the member is uncontactable – section 150-25
 - the member is not an Aboriginal and Torres Strait Islander person – section 150-30, and
 - the member has misbehaved – section 150-35.
- 7.2 Cancellation of membership provisions under sections 150-22(3)(a) or 150-30 could be applicable when a corporation becoming an RNTBC changes its membership eligibility to

reflect the native title determination or in circumstances where an individual's eligibility cannot be verified.

- 7.3 The rule book of an RNTBC cannot provide for cancellation of membership on any other ground unless the corporation has obtained an exemption from the Registrar under section 187-5 – section 150-15(2A).
- 7.4 The rule book of a RNTBC must provide for procedures for cancellation that are in accordance with the requirements of Division 150 of the CATSI Act and the RNTBC must follow these procedures to lawfully cancel a person's membership of the corporation.
- 7.5 As noted above, the cancellation of personal membership should not permanently disentitle an otherwise eligible common law holder from being represented directly within an RNTBC, even if the person is able to be indirectly represented.

8. Dispute resolution

- 8.1 The rule book of each RNTBC is required to have provisions that provide for the resolution of disputes between the corporation and common law holders or people who claim to be common law holders (whether or not they are a member of the corporation). This provision/s must provide for the resolution of disputes in relation to:
 - whether or not the person is a common law holder
 - the RNTBC's performance of its functions under native title legislation – section 66-1(3B).
- 8.2 In addition, like all other corporations, the rule book of each RNTBC must also provide for the resolution of internal disputes – section 66-1(3A).
- 8.3 Where an RNTBC refuses the membership application of a person who claims to be a common law holder, the aggrieved person may lodge a dispute notice under these provisions.
- 8.4 Where a person considers they have not had their dispute handled in accordance with the dispute resolution procedures, they may wish to seek assistance from the Registrar's office with the resolution of their dispute.
- 8.5 As a general rule the Registrar's office will not assist with the resolution of a dispute before the parties have considered the dispute in accordance with the corporation's own procedures.

End of policy statement